Supreme Court, U.S.
FILED

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No.

In the Supreme Court Of the United States

October Term, 1994

STEVEN AUGUSTUS, ET AL.

Petitioners

VERSUS

STATE OF LOUISIANA, THROUGH ITS GOVERNOR, EDWIN EDWARDS, ET AL.

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

Jack L. Dveirin
Counsel Of Record

Samuel S. Dalton
Attorney For Petitioners
P.O. Box 10501
Jefferson, La 70181
(504) 835-4289

QUESTIONS PRESENTED

Whether the Louisiana Judiciary can be impartial as required by the Due Process Clause of the Fourteenth Amendment in adjudicating the issue of returning money unconstitutionally exacted by and for the benefit of the Judiciary.

Whether the Louisiana Supreme Court failed to recognize a cause of action under the Fifth Amendment for the return of money unconstitutionally taken by the Judiciary from presumed innocent arrestees as a commission for allowing the exercise of the fundamental right to bail.

Whether the Louisiana Supreme Court failed to recognize a cause of action for the return of seized property under the Fourth Amendment where the Judiciary demanded money from presumed innocent arrestees as a condition precedent to the exercise of their fundamental right to bail.

Whether, in addition to the Fourth and Fifth Amendments, the Louisiana Supreme Court's arbitrary and capricious failure to apply a statutory provision (applicable to a small percentage of petitioners) which mandated the return of money taken by the Judiciary, violates the Due Process Clause of the Fourteenth Amendment.

Whether the Louisiana Supreme Court failed to recognize a cause of action under the Equal Protection Clause of the Fourteenth Amendment where money taken under duress by the Judiciary from presumed innocent arrestees as a condition precedent to the exercise of their fundamental right to bail was arbitrarily and capriciously returned to some arrestees but not to others.

Whether the Louisiana Supreme Court failed to recognize a cause of action for a federal constitutional tort where money was unconstitutionally taken by the Judiciary under duress from presumed innocent arrestees as a commission for allowing the exercise of the right to bail.

Whether money taken by a state judiciary through duress from presumed innocent arrestees as a commission for allowing the exercise of their fundamental right to bail should be classified as taxation or confiscation, and, if the former applies, whether Louisiana's tax refund statute is unconstitutionally vague under the Fourteenth Amendment.

PARTIES TO THIS PROCEEDING

PLAINTIFFS:

Steven Augustus, Jerry Berry, Wendell Gillan, Lee Gray, Wayne Scott, LeRoy Turner, Patricia Singleton, Alvin Williams, Bryan Bradham, Francisco A. Piedra, Rickie A. Foley, Bridget Ingram, Timothy F. Simons, Earl Everson, Neff Gomez, Gerald Hebert, Roy Johnson, Kenneth Charles Saulsberry, Bobby Rembert, Columbus Chris Williams, and all other persons or entities who paid or promised to pay money under the four statutes involved in this proceeding.

DEFENDANTS:

The State of Louisiana, through its Governor, Edwin Edwards,;

The judges of the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana, including: G. Thomas Porteous, Jr., Ernest V. Richards, Jr., Susan Chehardy, Walter E. Kollin, Clarence E. McManus, Patrick J. McCabe, M. Joseph Tiemann, Hubert A. Vondenstein, Charles V. Cusimano,II, Jacob L. Karno, Douglass Allen, Robert J. Burns, Alvin Oser, Ronald P. Loumiet, Martha Sassone, Jody Grant, Joseph. Grefer;

The judges of the Thirty-Second Judicial District Court for the Parish of Terrebonne, State of Louisiana, including: Edward J. Gaidry, Baron B. Bourg, Timothy C. Ellender, John T. Pettigrew, Paul R. Wimbish;

The judges of the Criminal District Court for the Parish of Orleans, State of Louisiana, including: Leon A. Cannizaro, Jr., Shirley G. Wimberly, Jr., James F. Shea, Calvin Johnson, Dennis J. Waldron, Frank A. Marullo, Jr., Jerome M. Winsberg, Miriam Waltzer, Patrick G. Quinlan.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

Petitioners pray that a writ of certiorari issue to review the opinion of the Louisiana Supreme Court entered in this case on June 24, 1994.

OPINIONS BELOW

The denial of certiorari by the Louisiana Supreme Court to the Louisiana Fifth Circuit Court of Appeal is reported at __So.2d __ (No. 94C 1084 La. 1994) and is set out in Appendix, *infra*, p. A-2. The affirmance of the state district court decision by the Louisiana Fifth Circuit Court of Appeal, 636 So.2d 1218 (No. 93-CA-890, Ct.App. 5th Cir. 1994), is unpublished and set out in the Appendix, *infra*, p. A-3 to p. A-11. The judgment of the Twenty Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana, is unpublished and set out in the Appendix, *infra*, p. A-12 to p. A-15.

JURISDICTION

The judgment of the Louisiana Supreme Court denying certiorari was entered on June 24, 1994. The jurisdiction of this Court rests on 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

This is a class action suit by petitioners against the State of Louisiana, the Governor of Louisiana, the judges of the district courts of Jefferson and Terrebonne Parishes, and the judges of the Criminal District Court of Orleans Parish, for restitution of a statutory fee exacted under duress from arrestees by district judges as a condition precedent to pretrial release from jail. The state district court dismissed petitioners' suit on exceptions of no cause of action. The state appellate court affirmed the dismissal and the state supreme court denied certiorari without comment by a vote of four to three.

This sordid affair began when the Louisiana Legislature, at the request of the district judges in Orleans, Jefferson, and Terrebonne Parishes, passed four statutes authorizing the judiciaries in Orleans, Jefferson, and Terrebonne Parishes to exact from arrestees a 2% charge on the face amount of all commercial, property, and personal surety appearance bonds, and a $20.00 charge on all recognizance bonds, as a condition precedent to pretrial release from jail. For convenience, the laws (see Appendix, *infra*) are referred to hereinafter as "Old Jefferson Law" (p.A-16-p.A-17), "New Jefferson Law" (p.A-16-p.-A-17), "Orleans Law" (p.A-18), "Terrebonne Law" (p.A-19), and are referred to collectively as "the four statutes." The Old Jefferson Law became the New Jefferson Law when it was amended to delete a provision mandating the return of money taken from arrestees who were not subsequently convicted. The three judiciaries enacted local court rules implementing the four statutes. Arrestees were forced to either pay the charge, promise to pay the charge, or forgo their right to bail and stay in jail.

A series of lawsuits was filed and consolidated in the U.S. District Court for the Eastern District of Louisiana challenging the constitutionality of the four statutes, requesting

injunctive relief against their enforcement, and seeking the return of all money collected. Augustus vs. Roemer, 771 F.Supp. 1458 (E.D.La. 1991). The issues in the federal proceeding were bificurated so that an initial trial could be limited to the constitutionality of the four statutes on their face. A Minute Entry dated March 14, 1991 was issued by United States District Judge Henry A. Mentz, Jr. ordering that an initial trial be held in which "the only issue presented will be whether La.Rev.Stat.Ann. 13:994 (Old and New Jefferson Laws) is constitutional on its face." A Minute Entry dated May 17, 1991 by Judge Mentz made the March 14, 1991 Minute Entry applicable to all of the consolidated cases. Trial was held on June 5, 1991. No live testimony was presented. Briefs were presented by all parties regarding only the constitutionality of the four statutes on their face. On July 16, 1991, Judge Mentz, borrowing an adjective from the Louisiana Supreme Court in State vs. Waggoner, 8 So. 209,211 (La. 1890), rendered Judgment analogizing the 2% charge to extortion and holding the four statutes unconstitutional on their face because they: violated procedural due process; constituted per se excessive bail; violated the Equal protection Clause of the Fourteenth Amendment. Augustus vs. Roemer, *supra*.

The decision of the federal district court broke new ground. It was the first federal decision to squarely decide whether and to what extent the Eighth Amendment right to bail is a fundamental constitutional right. Recognizing the futility of challenging the sound reasoning of the federal district judge, the defendant judiciaries dismissed their appeal shortly after filing a notice of appeal with the United States Fifth Circuit Court of Appeal. Petitioners then turned to state court to seek restitution of the money which had been taken from them in their criminal proceedings under duress pursuant to the enjoined unconstitutional statutes.

Petitioners filed suit for return of their money in the Twenty-Fourth Judicial District Court for The Parish of Jefferson, State of Louisiana. The grounds alleged in the lawsuit include state statutes, state constitution, and federal constitution, including the following: Louisiana Code of Civil Procedure Article 2541 for recognition of the federal judgment by the Louisiana Judiciary; Louisiana Civil Code Articles 2301, et seq. for restitution of payment of a thing not owed (quasi-contractual claim); LSA-R.S. 15:41 for the return of property seized in connection with a criminal proceeding; return provision of Old Jefferson Parish Statute (Act 158 of 1989);

state and federal constitutional tort; 42 U.S.C. §1983; Fourteenth Amendment Equal Protection and Due Process Clauses; Fifth Amendment; and, Fourth Amendment.

The lawsuit created a political quagmire for the Louisiana Judiciary. The money collected under the enjoined statutes went into a fund exclusively controlled by the district judges. State judges are elected in Louisiana. Petitioners' lawsuit asked the Louisiana Judiciary to order fellow elected judges in two of the biggest parishes in the state to return money collected under circumstances likened to extortion by a federal judge. The defendants filed two sets of peremptory exceptions including exceptions of res judicata, no cause of action, no right of action, prescription, and mootness. All of the district judges of the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana recused themselves. The Louisiana Supreme Court appointed a retired judge from Chalmette to hear the case, but he withdrew. The Louisiana Supreme Court appointed a second retired judge from Shreveport who also withdrew. The Louisiana Supreme Court appointed a third retired judge from Nachitoches[1], Louisiana. The third retired judge appointed to hear the case, without

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[1](pronounced *Nakitish*).

conducting an evidentiary hearing, dismissed the suit on the ground of no cause of action, finding plaintiffs' claims against the judges barred by judicial immunity and their claims against the State barred by sovereign immunity. The district court did not rule on defendants' other exceptions and did not comment on petitioners' federal constitutional claims. Petitioners appealed to the Louisiana Fifth Circuit Court of Appeal, which, coincidentally, shares a courthouse with the defendant judiciary from Jefferson Parish. The court of appeal, in an **unpublished** opinion, affirmed the district court's dismissal solely on the ground of no cause of action. In particular, the appellate court clarified that although the district judge had discussed his view of how prescription would apply to petitioners' tort theory of liability (but not petitioners' quasi-contractual or constitutional claims), the exceptions of no cause of action were the only exceptions ruled on. Petitioners then filed a writ application for certiorari with the Louisiana Supreme Court. Even though the Louisiana Supreme Court had granted certiorari and remanded a previous writ application on the same issue filed by a single arrestee in State v. Jones, 586 So.2d. 521 (La. 1991) (See Appendix, *infra*, p. A-22), the Court, without comment, refused to grant the writ and review the matter by a vote of four to three on June 24, 1994. (See Appendix, *infra*, p.A-2).

The basic question presented to this Court is whether Louisiana must recognize a cause of action for restitution to petitioners who each paid up to several thousand dollars under duress to a fund exclusively controlled by district judges to obtain pretrial release on bail.

REASONS FOR GRANTING THE WRIT

It took unconscionable conduct by state district judges for a federal district judge to quote language comparing such conduct to extortion and to break new ground by deciding the fundamental nature of the Eighth Amendment right to bail. Certiorari should be granted in this case because the failure of the Louisiana Judiciary to return money exacted under duress from presumed innocent arrestees as the judiciary's commission for allowing the exercise of a fundamental constitutional right is contra to the Fourth, Fifth, and Fourteenth Amendments and the appearance of judicial impartiality.

ARGUMENT

Petitioners presented the state courts with a number of claims for the return of their money under Louisiana Statutes, the Louisiana Constitution, and the United States Constitution. The state judiciary dismissed petitioners' suit solely on the ground of no cause of action without any comment on most of the state statutory grounds or any comment whatsoever on the state or federal constitutional grounds. The basic question presented to this Court is whether the state and the three concerned judiciaries must afford a judicial remedy for restitution of petitioners' money under one or more of the federal constitutional grounds discussed below.

I. The Louisiana Supreme Court Cannot Be Impartial As Required By The Due Process Clause Of The Fourteenth Amendment.

Two factors make this case unique: 1) The money involved was exacted from presumed innocent arrestees **under duress** by and for the exclusive economic benefit of the judiciary; 2) In a state where district, appellate, and supreme court judges are elected, it is impossible for any level of the state judiciary to be neutral in adjudicating the return of money wrongfully exacted by the judiciary itself.

There have been other cases where state and local governments have violated the federal constitution by charging money for the exercise of a fundamental constitutional right. Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 86 S.Ct. 1079 (1966) struck down a Virginia law that required voters to pay $1.50 as a condition precedent for exercising their right to vote in state elections. But there has never been another case where a state judiciary exacted **under duress** amounts ranging from $20.00 to $2000.00 from presumed innocent arrestees as a condition precedent to exercising their fundamental constitutional right to freedom through bail. Duress elevates this case from the realm of a constitutional violation to the realm of a constitutional atrocity. If state judges are allowed to keep the money obtained under duress by selling fundamental constitutional rights to arrestees, what will keep state government from selling convicted inmates the fundamental right to be free from cruel and unusual punishment? What will keep state government from selling release from prison after a sentence has been completed? There is no dis-incentive for state government to refrain from enacting such unconstitutional and unconscionable laws if it gets to keep the ill-gotten gains exacted before a federal injunction is rendered.

The Court in Marshall v. Jerrico, Inc., 446 U.S. 238,242, 100 S.Ct. 1610,1613 (1980), stated:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the law. At the same time, it preserves both the appearance and reality of fairness, generating the feeling, so important to popular government, that justice has been done, by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.
>
> The requirement of neutrality has been jealously guarded by this Court.

It would be extremely detrimental to the campaign fund raising ability of district, appellate, or supreme court judges in Louisiana to order the dozens of district judges in Orleans, Jefferson, and Terrebonne Parishes to make restitution of money currently under their exclusive control. Even the Louisiana Supreme Court Justices have to run for reelection in the same districts as the defendant-judges. The only way for petitioners to obtain an impartial hearing on whether the United States Constitution affords them a remedy is for the United States Supreme Court to adjudicate same.

II. The Louisiana Supreme Court Failed To Recognize A Cause Of Action For The Return Of Property Taken For Public Use Without Just Compensation Under The Fifth Amendment.

The pertinent words of the Fifth Amendment are: "nor shall private property be taken for public use, without just compensation." Petitioners argued in their state court proceeding that their property (money) had been unconstitutionally taken and converted to public (the district judges') use. The Court in Webb's Fab. Pharmacies, Inc. vs. Beckwith, 449 U.S. 155, 101 S.Ct. 446 (1980), held that a Florida statute which allowed a county to take possession of interest accruing on an interpleader fund deposited in the registry of the county court was a taking violative of the Fifth and Fourteenth Amendments. In that case the depositor of the fund had **voluntarily** exercised its option to avail itself of statutory protection from the claims of creditors. Florida's statutory scheme allowing the court to keep the interest on the voluntarily deposited fund looks benign compared to Louisiana's scheme allowing district judges to use **duress** to demand a commission from presumed innocent arrestees for their freedom through bail. It is important to note that the

Florida scheme did not involve a fundamental constitutional right whereas the Louisiana scheme involved the fundamental right to bail. The Court in Webb's Fab. Pharmacy, like the Court in Augustus, supra, 1469-1470, held that the money involved was not a "fee for services." Id., 449 U.S.,162. The Court described the money as "a forced contribution to general governmental revenues" and the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That clause stands as a shield against the arbitrary use of governmental power." Id., 449 U.S.,163-164. Like the plaintiffs in Webb's Fab. Pharmacy, the taking of petitioners' money was a matter of confiscation, not simply a matter of taxation.

III. The Louisiana Supreme Court Failed To Recognize A Cause Of Action For The Return Of Property Seized In Violation Of The Fourth Amendment.

The 2% charge was exacted/seized from arrestees in their criminal proceedings. Petitioners asserted in their state court pleadings that the Fourth Amendment requires the return of all such unconstitutionally seized money. The state courts did not comment on this claim. Both Louisiana and the United States have rules of criminal procedure to deal with the return

of money seized in a criminal proceeding. LSA-R.S 15:41 provides in pertinent part:

> B) (1) The seized property shall be returned to the owner, unless a statute declares the property to be contraband, in which event the court shall order the property destroyed if the court determines that its destruction is in the public interest; otherwise, paragraph (2) of this Section shall apply.
>
> 2) If the seized property is contraband . . .

Federal Rule Of Criminal Procedure 41 (e) provides in pertinent part:

> A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property. . . .

LSA-R.S 15:41 and Federal Rule Of Criminal Procedure 41 (e) are designed to comply with government's obligations under the Fourth Amendment. The Court in Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294,308, 87 S.Ct. 1642,1650 (1967) stated: "Where public officials unlawfully seize ***or hold*** a citizen's realty or chattels, recoverable by appropriate action at law or in equity . . ., the true owner may bring his possessory action to reclaim that which is wrongfully withheld." (citations omitted, emphasis in original). The Fourth Amendment requires the return of petitioners' money.

IV. In Addition To The Fourth And Fifth Amendments, The State Court's Arbitrary And Capricious Failure To Apply A Provision In The Old Jefferson Law Mandating The Return Of The 2% Charge To Non-Convicted Arrestees, Violates Due Process Under The Fourteenth Amendment.

Perhaps the clearest example of the Louisiana Judiciary's lack of neutrality and the Louisiana Legislature's lack of constitutional conscience is the amendment to the Old Jefferson Law that resulted in the New Jefferson Law. The only difference between the Old Jefferson Law and the New Jefferson Law is one sentence (See Appendix, *infra*, p.A-16-p.A-17). The following sentence appeared in the Old Law but not in the New Law.

> The fee herein collected shall be refunded to the defendant if he is determined to be not guilty or if the charges are dismissed.

The state courts refused to recognize a cause of action for petitioners who paid the 2% charge under the Old Jefferson Statute. The state appellate court erroneously found: "There is no statutory authority, however, for refund of the bail bond fees." (See Appendix, *infra*, p.A-9)

> The legislature or supreme authority cannot assume to itself a power to rule by extemporary, arbitrary decrees, but is limited to decide the rights of the subject by promulgated, standing laws, and known authorized judges. J. Locke, The Second Treatise of Civil Government, Chap. X, § 136 (T. Cook ed. 1947) (6th ed. 1764).

The Court in Bounds v. Smith, 430 U.S. 817,823, 97 S.Ct. 1491,1495 (1977) stated that Fourteenth Amendment Due Process requires "adequate," "effective," and "meaningful," access to the courts. Petitioners have stated a cause of action under the exact wording of the Old Jefferson Statute. The Louisiana Courts cannot arbitrarily and capriciously deny petitioners' access to the courts to prosecute this cause of action.

V. The Louisiana Supreme Court Failed To Recognize A Cause Of Action Under The Equal Protection Clause Of The Fourteenth Amendment.

The test of strict judicial scrutiny applies to state statutes which interfere with the exercise of fundamental rights and liberties explicitly or implicitly protected in the Constitution. San Antonio Independent School District v. Rodriguez, 411 U.S. 1,16, 93 S.Ct. 1278,1287 (1973). Even where no fundamental right is implicated, classifications based on "invidious discrimination" have been held unconstitutional under the rational basis test. Rinaldi v. Yeager, 384 U.S. 305,309, 86 S.Ct. 1497,1500 (1966).

Because the 2% bail fee was a prior restraint on the exercise of the fundamental right to bail, the application of the four statutes should be closely scrutinized. The Louisiana Courts did not comment on petitioners' equal protection argument despite being presented with proof that some arrestees received restitution. (See Appendix, *infra*, p.A 20-A-21.) In State vs. Jones, 586 So.2d 521 (La. 1991), the 2% charge was returned by the Orleans Parish Judiciary. An evidentiary hearing would prove that the 2% charge was returned to others besides Jones in Orleans Parish. Jones' money was returned by the Orleans Parish Judiciary, but only the Old Jefferson Law mandated the return of the 2% charge to non-convicted arrestees. Did the three judiciaries and the State have a compelling interest in returning the 2% charge to some arrestees but not others? Were the district judges arbitrary and capricious in selecting which arrestees and which attorneys' clients got their money back and which did not? Why were some arrestees treated differently than others with regard to the return of their 2% bail bond fee? This factual issue constitutes a classic cause of action under the Equal Protection Clause of the Fourteenth Amendment.

VI. The Louisiana Supreme Court Failed To Recognize A Cause Of Action For Federal Constitutional Tort.

Petitioners' cause of action sounding in tort is similar to the claim of federal constitutional tort in Bivens vs. Six Unknown Named Agents of Fed. Bur. Of Narc., 403 U.S. 388, 91 S.Ct. 1999 (1971). In that case a complaint alleging that agents of the Federal Bureau of Narcotics made a warrantless entry of the plaintiff's apartment, searched the apartment and arrested the plaintiff on narcotics charges, all without probable cause, stated a cause of action under the Fourth Amendment of the United States Constitution for damages. Petitioners alleged in their state court proceeding that defendants wrongfully took and withheld money belonging to petitioners. The Louisiana Supreme Court failed to recognize this cause of action for federal constitutional tort.

VII. The Louisiana Supreme Court Failed To Recognize A Cause Of Action Under The Fourteenth Amendment Due Process Clause That The Louisiana Tax Refund Statute Is Unconstitutionally Vague And Ambiguous.

Section 40 of the Magna Carta states that among the duties government owes to its subjects is that:

> To no one will we sell, to no one will we refuse or delay, right or justice.[2]

The state courts, without conducting an evidentiary hearing, made an erroneous factual determination that the money exacted from petitioners in their criminal proceedings was a tax. Under Mckesson v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 110 S.Ct. 2238 (1990), the remedial aspects of an unconstitutional tax statute are provided for in a tax refund statute. However, the money exacted from petitioners cannot be classified as a tax within the scope of McKesson. The Court in Augustus, *supra*, after discussing National Cable Television Association, Inc. v. United States, 415 U.S. 336 (1974), and then analogizing the 2% bail charge to extortion, analyzed the 2% bail charge as a tax, as a court cost, and as a penalty.

> We fail to see, though, how requiring a bond to be posted and then charging a ***fee*** for safekeeping confers a benefit on anyone but the state. And, as to sending out notices, due process requires such notices to be sent prior to hearings . . . .To the extent that the 2% charge **penalizes** or **taxes** the exercise of the fundamental right to pretrial release once eligibility to release has been determined, we agree with the plaintiffs that such a tax or penalty is per se excessive." Augustus, *supra*, 1471 and 1471 fn. 25.

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[2]The original Latin text reads: "Nulli vendemus, nulli negabimus, aut differemus, rectum aut justiciam."

The 2% charge was intended as a type of court cost. The Orleans Parish Law (Appendix, *infra*, p. A-18) is entitled *BAIL BOND **FEE***. The word *fee* appears eight times in the statute. Like a court cost in a civil case, the statute provided that "this **fee** is imposed for the purpose of funding the administration and forfeiture of such bonds." Like a court cost in a civil case, the charge could be waived for indigents or anyone else at the discretion of the district judges and was to "be deposited in the criminal court cost fund of the criminal district court." The New Jefferson Parish Law (Appendix, *infra*, p. A-16-p. A-17) begins: "In addition to all other **fees** or costs now or hereafter provided by law, there is hereby imposed a **fee** on each bail bond . . ." The word *fee* appears eight times in the Jefferson Parish Law. The statute called the charge a bail bond *fee* which could be waived for indigents. The Terrebonne Parish Law (Appendix, *infra*, p. A-19) was identical to the Jefferson Parish Law (as amended). Clearly, the intent of the four unconstitutional statutes was to impose a court cost type of fee on bail bonds.

But, under the reasoning of the Court in Augustus, *supra*, petitioners' money does not meet the legal definition of a tax or a fee. It is simply money unconstitutionally seized by a

judiciary through duress. The Court in Augustus looked to an 1890 decision from the Louisiana Supreme Court to find an appropriate label for the bail bond charge. Id.,1471 fn. 23. The Court quoted State vs. Waggoner, 8 So. 209,211 (La. 1890) which held that exacting $1.00 from arrestees "as a condition precedent to the release of his person from custody" is "**extortionate**." In that case a state statute provided:

> The sheriffs throughout the state shall be entitled to demand and receive the following fees of office . . . . For taking bond in all cases, civil or criminal, when by law the sheriff is required to take bond, $1.00. Id.

The United States Supreme Court is not bound by the characterization given to state action by a state legislature or by a state judiciary when that action affects federal constitutional rights. If a state statute calls a charge a fee, and the state judiciary calls the charge a tax, and a federal court likens the charge to extortion, the United States Supreme Court has a duty to examine the real nature of the charge where federal constitutional rights are concerned. Carpenter v. Shaw, 280 U.S. 363,367-368, 50 S.Ct. 121,123 (1930). See also: United States v. Allegheny County, 322 U.S. 174,184, 64 S.Ct. 908,914 (1944). The Court in Brushaber v. Union P. R. Co., 240 U.S. 493,504, 36 S.Ct.236,237 (1916) stated that what a legislature

calls a tax statute may compel

> the conclusion that it was not the exertion of taxation, but a confiscation of property; that is, a taking of the same in violation of the Fifth Amendment, or so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion.

There are three factors which prove that the money taken in this case is not a tax within the meaning of Mckesson, *supra*. First, the Louisiana Legislature did not view the bail bond charge as a tax. The Louisiana legislature failed to comply with even the most basic requirements of a tax in enacting the four unconstitutional statutes. Article 3, § 2 of the Louisiana Constitution of 1974 prohibits the enactment of taxes in regular sessions in odd numbered years. Yet the Legislature enacted the four unconstitutional statutes in regular sessions in both odd and even numbered years. Article 7, § 2 of the Louisiana Constitution of 1974 requires the vote of "two-thirds of the elected members of each house of the legislature" to enact a tax. Yet the Old Jefferson Statute (HB 1005, Act 158 of 1989) received only 57 votes in the House of Representatives, 13 votes less than two-thirds of the 105 Representatives. Clearly the legislature did not intend the bail bond charge as a "tax." It neither called it a tax or enacted it like a tax.

Second, the circumstances surrounding the application of the four statutes proves that they are not tax laws. Taxes are not waiveable for indigents at the discretion of a judge. The 2% charge, like a court cost type fee, was waiveable at the discretion of a judge. Taxes are collected by tax collectors. The 2% charge was exacted by District Judges. District Judges are not tax collectors. They can collect court cost type fees, but not taxes. Taxes are not collected under duress while the taxpayer is held hostage in jail. The executive branch of government can collect taxes. But it would be a violation of Fourteenth Amendment Due Process and separation of powers for a state legislature to impose upon state district judges the indignity of being tax collectors, even if some district judges are willing to accept such indignity.

Third, the 2% charge is not a "tax" within the meaning of McKesson, *supra*, because the object of the charge is not within the taxing power of government. There are few things that do not come within the far-reaching taxing powers of local, state, and federal government. Government can and does tax income, property, sales, and inheritance. Income, property, sales, and inheritance are all monetary interests that

are subject to the taxing power of government. It is difficult to think of a list of things that are not subject to the taxing power of government. One thing government has no power whatsoever to tax is the exercise of a liberty interest (as opposed to a monetary interest) by a presumed innocent arrestee. The 2% bail bond charge cannot be labeled a *tax* within the meaning of McKesson because the exercise of the fundamental constitutional right to bail is an object that is not within the taxing power of the Louisiana Legislature. A liberty interest like the fundamental right to bail is to a limited extent within the police power of government, but to no extent whatsoever within the taxing power of government.

Petitioners' state court petition alleged that in the alternative that the Louisiana tax refund statutes applied, then said statutes (LSA-R.S. 47:1481, et seq.) are unconstitutionally vague and ambiguous under the Fourteenth Amendment. The state courts, without citing a single case or taking evidence, called the money a tax and then ruled that petitioners' do not have a cause of action to challenge the constitutionality of the tax refund statute on its face or as applied to petitioners. The tax refund statutes read in pertinent part:

> Any person who has a claim against the State of Louisiana for money erroneously paid into the State Treasury, or for any other claim, may present such claim to the board of tax appeals, in such form and together with such proofs as the board of tax appeals may require by its rules and regulations. The board shall duly examine into the justice, merits and correctness of each such claim presented to it, and shall officially pass thereon.

The tax refund statute applies to a claim "for money paid into the state treasury." The 2% charge was not paid into the state treasury. It was paid into funds controlled by the judiciaries in the three concerned parishes and never reached the state treasury. "The judges, en banc, of the Twenty-Fourth Judicial District Court, shall have control over the fund and all disbursements made therefrom." Old and New Jefferson Laws, Appendix, *infra*, p. A-16. When the 2% charge was returned to the arrestee in State v. Jones, *supra*, the check was drawn on the account of the "Orleans Parish Criminal District Court Cost Fund." (See Appendix, *infra*, p.A-20-p.A-21). The Louisiana Supreme Court's grant of supervisory and remedial writs in State v. Jones proves that the Court recognized the constitutional issues raised by the failure of the criminal court to return Jones' money.

> This case is remanded to the trial court and it is hereby ordered to expeditiously conduct an evidentiary hearing on plaintiff's motion and to decide the constitutional issues raised. Id.,521. (See Appendix, *infra*, p. A-22).

One Justice dissented from the Court's order "believing the matter is moot because of the federal court order."[3] Id. After Jones' writ application was granted his money was returned. The Louisiana Supreme Court subsequently refused to grant certiorari in petitioners' case even though the lower courts failed to order the return of petitioners' money, grant an evidentiary hearing, or decide the federal constitutional issues.

In addition to covering a claim "for money paid into the state treasury," the tax refund statute purports to apply to "any other claim." The Court in Stromberg v. California, 283 U.S. 359,369, 51 S.Ct. 532,536 (1931), stated that:

> A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment.

The phrase and "any other claim" is much too vague and ambiguous to be construed as requiring the filing of a claim with a tax board by arrestees in a criminal proceeding who are coerced into paying 2% of the amount of their bail bond into a fund controlled by the district judges to obtain pretrial release.

---

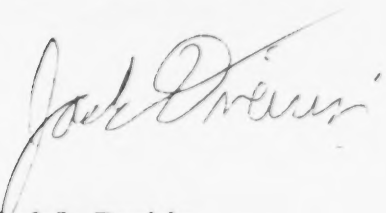
[3]The "federal court order" referred to is Augustus v. Roemer, *supra*.

If the United States Constitution requires that an unconstitutional excise tax has to be refunded (McKesson, *supra*), and interest on an interpleader's deposit has to be turned over to creditors (Webb's Fab. Pharmacies, Inc. vs. Beckwith, *supra),* then surely the money taken under duress from presumed innocent arrestees as a commission to the judiciary for allowing the exercise of a fundamental right to freedom has to be returned. What happened to petitioners was not the exertion of taxation, but a confiscation of property. At the very least, it was "so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion." Brushaber v. Union P. R. Co., *supra*, 240 U.S., 504.

CONCLUSION

Petitioners have stated a cause of action for return of their money. Their petition for certiorari should be granted.

Respectfully submitted:



Jack L. Dveirin
Counsel Of Record

Samuel S. Dalton
P.O. Box 10501
Jefferson, La 70181
(504) 835-4289

Attorneys For Petitioners

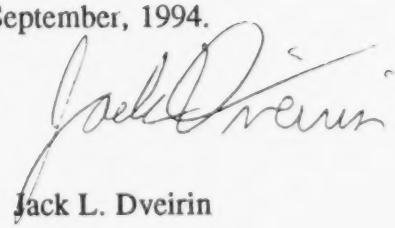
CERTIFICATE OF SERVICE

I, Jack L. Dveirin, one of the attorneys for petitioners, do hereby certify that I have this day served a true and correct copy of the foregoing Writ of Certiorari to the following counsel:

Patricia Nally Bowers, counsel for the judges of Orleans, Jefferson, and Terrebonne Parishes, and the State of Louisiana, 201 St. Charles Avenue, Suite 2505, New Orleans, LA 70170 ;

Henri Wolbrette, counsel for the judges of Jefferson Parish, 643 Magazine Street, New Orleans, LA 70130,

This, the 21st day of September, 1994.



Jack L. Dveirin

APPENDIX

THE SUPREME COURT OF THE STATE OF LOUISIANA

STEVEN AUGUSTUS, ET AL

VS.

STATE OF LOUISIANA, THROUGH
ITS GOVERNOR, EDWIN EDWARDS, ET AL

NO. 94-C - 1084

IN RE: Augustus, Steven; - Plaintiff(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fifth Circuit, Number 93-CA-0890; Parish of Jefferson Twenty-Fourth Judicial District Court Div."D" Number 427-921.

June 24, 1994

Denied.

WFM
JCW
PH
CDK

CALOGERO, C.J. would grant the writ.

DENNIS, J. not on panel.

LEMMON, J. would grant the writ.

ORTIQUE, J. would grant the writ.

Supreme Court of Louisiana
June 24, 1994

S/FRANS J. LABRANCHE, JR.

Clerk of Court
for the Court

NOT DESIGNATED FOR PUBLICATION

STEVEN AUGUSTUS, ET AL 93-CA-890

VERSUS COURT OF APPEAL

STATE OF LOUISIANA, FIFTH CIRCUIT

THROUGH ITS GOVERNOR,

EDWIN, EDWARDS, ET AL STATE OF LOUISIANA

APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT

IN AND FOR THE PARISH OF JEFFERSON, STATE OF LOUISIANA

NUMBER 427-921

HONORABLE JULIAN E. BAILES, AD HOC JUDGE PRESIDING

THOMAS C. WICKER, JR.

JUDGE

MARCH 29,1994

(Court composed of Judges Thomas J. Kliebert, Edward A. Dufresne, Jr., and Thomas C. Wicker, Jr.)

(COUNSEL NAME AND ADDRESSES OMITTED)

AFFIRMED

This is a class action suit by 20 individual plaintiffs against the State of Louisiana, the governor of Louisiana, the judges of the district courts of Jefferson and Terrebonne Parishes, and the judges of the criminal district court of Orleans Parish, for refund of amounts assessed against. the plaintiffs pursuant to statutes imposing fees on bail bonds. The trial court dismissed the suit, finding plaintiffs' claims against the judges barred by judicial immunity and their claims against the State barred by sovereign immunity. Plaintiffs have appealed and defendants have answered the appeal. We affirm, for the reasons that follow.

The plaintiffs seek the refund of fees they paid in connection with bail bonds for release after arrest. The fees were levied by the judges of the respective courts pursuant to statutes which impose a charge of 2% on all commercial and property appearance bonds and $20 on all recognizance bonds. Those statutes are La. R.S. 13:994 (Jefferson Parish), La. R.S. 13:1384 (Orleans Parish), and La. R.S. 13:996 (Terrebonne Parish). The text of those statutes is set out in the Endnote hereto.[1]

The statutes were declared unconstitutional by a federal court in Augustus v. Roemer, 771 F. Supp. 1458 (E.D. La.

1991), a suit consolidating four separate actions in which the various plaintiffs sought relief pursuant to 42 U.S.C. § 1983. The federal judge found the laws imposing the bail bond fees unconstitutional on their face and granted a permanent injunction against enforcement of the statutes, in a judgment entered on July 28, 1991. The plaintiffs also had requested refund of the fees in that suit, but the federal court did not rule on that request and plaintiffs sought no further relief in the federal system.

The case at bar was filed in the state court on January 16, 1992. Sixteen of the 20 plaintiffs are Jefferson Parish residents, one is an Orleans Parish resident, and three are residents of Terrebonne Parish. One of the Jefferson Parish residents and two of the Terrebonne Parish residents are bail bondsmen who paid the fees in connection with bail bonds they underwrote. All the other plaintiffs either paid or promised to pay the fees on their own behalf. Plaintiffs assert a class action on behalf of all similarly situated persons and seek refund of the fees paid, or cancellation of their promises to pay such fees, under La. Civ. Code art. 2301, together with legal interest,

attorney's fees, and costs.[1] Plaintiffs also seek recognition of the federal court judgment and/or a declaration in the state court of the unconstitutionality of the statutes.

Defendants filed exceptions of prescription, res judicata, no cause of action and no right of action.

Defendants raised the exception of no cause of action on the basis that the statutes had already been held unconstitutional by the federal court, making further pursuit of that remedy in state court moot and making it unnecessary to decide whether the statutes violate the Louisiana constitution. They also argued that there is no cause of action against the defendant judges because of judicial immunity.

Defendants asserted the exception of no right of action on the basis of sovereign immunity, arguing that the claims asserted lie neither in contract nor in tort and, thus, are outside the scope of the state constitution's abrogation of sovereign immunity, absent express waiver thereof by legislative act.

As to prescription, defendants contended that challenges to the constitutionality of a state statute under the U.S.

---

[1]La. Civ. Code art. 2301 provides, "He who receives what is not due to him, whether he receives it through error or knowingly, obliges himself to restore it to him from whom he has unduly received it."

Constitution, 42 U.S.C. § 1983, and the Louisiana Constitution of 1974 are prescribed in one year. Defendants alleged that all the plaintiffs, except for plaintiffs Gomez and Saulsberry, knew or should have known of their claims, or had sufficient information to investigate them, more than one year prior to filing of the state court suit, because the latest date on which any of the individual plaintiffs (except Gomez and Saulsberry) paid or promised to pay the fees was October 10, 1990 and the instant suit was filed on January 16, 1992.

Finally, defendants advanced the exception of res judicata based on the existence of the federal court judgment, arguing that the parties had stipulated that the plaintiffs in the first federal court action would represent the class of all others similarly situated, without need of a formal class certification, and that any relief granted to those plaintiffs would be extended to the alleged class; further, that plaintiffs' request in the federal suit for refund of the fees, which was never decided by the federal court, precludes the state court's consideration of that issue.

The trial court's reasons for judgment addressed all the exceptions except res judicata.. The judge adopted the federal court's reasoning that the fees imposed by the bail bond statutes

are actually a form of tax, and he noted that the legislature had neither waived the state's immunity nor authorized the filing of this action. The court concluded that the collection of a fee authorized by a statute subsequently declared unconstitutional is not a tort against the person who paid the fee.

Assuming *arguendo* that collection of such a fee is a tort, the trial judge concluded that the tort prescriptive period of one year would run from the commission of the tort--that is, the date the fee was paid--and that the filing of the federal court action had not interrupted the running of the prescriptive period. However, he did not state specifically that the claims herein had prescribed. He ruled instead that the defendant judges have an absolute judicial immunity for such an alleged tort and that the claim against the State for restitution is barred by state sovereign immunity.

JUDICIAL IMMUNITY

When an official performs a function integral to the judicial process or a traditional legislative function, the official is absolutely immune from damage liability for acts performed in those capacities. *See* Moresi v. Dept. of Wildlife Fisheries, 567 So.2d 1081 (La. 1990). The defendant district judges were clearly performing functions integral to the judicial process

when they set the bonds on which the fees were assessed.

Plaintiffs concede they are not entitled to damages, but contend judicial immunity is inapplicable. Instead, they assert their cause of action is for a mandamus or a mandatory injunction ordering the judges, in their administrative capacities, to return money

There is no statutory authorization, however, for refund of the bail bond fees. Accordingly, there is no provision mandating the judges to return the fees and a mandatory injunction therefore is inapplicable.

SOVEREIGN IMMUNITY

La.Const. Art. XII, § 10 provides, in pertinent part:

> **A) No Immunity in Contract and Tort.** Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property.
>
> **B) Waiver in Other Suits.** The legislature may authorize other suits against the state, a state agency, or a political subdivision. A measure authorizing suit shall waive immunity from suit and liability.

Under our constitution, thus, the only types of suits in which the state's sovereign immunity has been waived are suits in contract or in tort. Suits on other grounds must by approved by the legislature.

This is not a suit in contract. Plaintiffs argue that it is a suit for a "constitutional tort." We do not agree.

In August v. Roemer, supra, the federal district court analyzed the bail bond fee and concluded that it was a type of tax. We agree, and adopt that analysis. What plaintiffs seek is in effect a tax refund. A claim for a tax refund is not a tort claim. Plaintiffs have not cited, and we have not discovered, any statute under which the legislature has authorized suits against the state for refund of such a tax. Accordingly, the trial court properly concluded this is the type of action in which a plaintiff must seek legislative approval before proceeding against the State, as required by La.Const. Art. XII, § 10(B). Legislative approval was not obtained; therefore, the suit properly was dismissed.

In conclusion, we note that after the appellants' brief was filed in this court, defendants filed a Motion to Strike or for Alternate Relief. That motion hereby is denied as moot.

Having decided the case on the foregoing grounds, it is

unnecessary to address the other arguments of the appellants. Accordingly, the judgment hereby is AFFIRMED. Costs of this appeal are assessed against the plaintiffs.

AFFIRMED.

ENDNOTES[2]

2 THE ENDNOTES, CONSISTING OF THE FOUR STATUTES INVOLVED IN THIS LITIGATION, HAVE BEEN OMITTED. HOWEVER, THEY APPEAR ON PAGES A-16 TO A-19 OF THIS APPENDIX, INFRA.

24TH JUDICIAL DISTRICT COURT

STATE OF LOUISIANA

STEVEN AUGUSTUS, ET AL

VS .

STATE OF LOUISIANA, ET AL

No. 427-921, DIV. "D"

REASONS FOR JUDGMENT

Herein plaintiffs filed suit against the State of Louisiana and certain elected judges of Orleans Parish, Jefferson Parish and Terrebonne Parish.

Plaintiffs have amended and supplemented their original petition, however, as viewed by this court, the entirety of the amended and supplemental petition adds no allegations of fact, but on the contrary, are mere conclusions of law and conclusions of the pleader.

The legislature has not waived the state's immunity nor authorized the filing of this action. The claim attempted to be asserted is the recovery of bail bond fees which are actual]y a form of tax imposed on the furnishing of an appearance bond for the appearance in court of defendants charged with commission of crimes in the respective jurisdictions.

Heretofore the plaintiffs filed suit in federal court

attacking the constitutionality of the respective statutes which imposed the fees or tax. The federal court rendered judgment in favor of plaintiffs holding that the statutes were unconstitutional. The ruling of the federal court is binding on the State of Louisiana and on the judges of the affected courts.

The defendants have filed, among other exceptions, exceptions of prescription, no cause of action, and no right of action.

The plaintiffs argue that the effect of the collection of bond fees was the commission by the judges of constitutional tort. To denominate this collection a tort in the manner in which plaintiffs seek to have the benefit of Louisiana Constitution of 1974, Article 12, Section 10 (A), which states:

> Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property.

Plaintiffs have cited no case to this court which holds that the collection of a fee authorized by a statute, subsequently declared unconstitutional, is a tort against the person who paid the fee.

Defendants' Exception of Prescription

However, assuming arguendo, that such a collection is a tort, the prescriptive period is one year from the commission of

the tort. This prescriptive period has not been timely interrupted. The filing of an action in federal court does not interrupt the running of a state prescriptive period. See Ford vs. Stone, 599 F.Supp. 693 (M.D.La. 1984), affirmed 774 F.2d 1158 (5th Cir. 1985).

Plaintiffs claim a three year prescriptive period under Civil Code article 3494 (1). Their reliance on this article of the Civil Code is mislaid. In that article the recipient of the liberation of the obligation is not the state or public official but rather the debtor of the fee or emolument owed.

Exception of No Cause of Action
and
Exception of No Right of Action

The defendant-judges have filed an exception of no cause of action to the action herein sought as a tort. This exception is sustained on the ground that the judges have an absolute judicial immunity for such an alleged tort.

The defendant-State of Louisiana has filed an exception of no right of action directed toward plaintiffs' claim against funds of the state under Civil Code Article 2301. The State of Louisiana under Louisiana Constitution of 1974, Article 12, Section 10 (B) has immunity from suit until such time as the legislature may authorize such an action.

In other words the tort claim by the plaintiffs ' against the the (sic) judges is barred by judicial immunity, the claim for rstitution (*sic*) against the state for fees paid is barred by the above cited state sovereign immunity.

For the foregoing reasons, the demands of the plaintiffs are rejected, and this suit is dismissed at plaintiffs' cost.

Natchitoches, Louisiana, this 9th day of August, 1993.

S/JULIAN E. BAILES
Judge ad hoc

L.R.S. 13:994, applicable to Jefferson Parish, provides in pertinent part:

> B. (1) In additional to all other fees or costs now or hereafter provided by law, there is hereby imposed a fee on each bail bond issued which is conditioned upon the appearance of the defendant in a criminal matter in the Twenty-Fourth Judicial District, including cash, property, and appeal bonds, in the amount of two percent of the face value of the bond or twenty dollars, whichever is the greater amount. The fee shall be paid by the bondsman who issues the bail bond, unless otherwise provided herein. The fee shall apply to bail bonds for all criminal offenses, except traffic offenses and ordinance violations which may be tried in courts of limited jurisdiction within the district. This is imposed for the purpose of funding the administration of criminal justice, including the forfeiture of such bonds.
>
> (2) The fee shall be paid by the defendant when a cash or property bond is posted. If the defendant is released on his own recognizance, the fee shall be twenty dollars. When the court finds the defendant is indigent and entitled to have counsel appointed, the court may waive the fee on any bond that was not issued or posted by a professional bondsman. The fee herein collected shall be refunded to the defendant if he is determined to be not guilty or if the charges are dismissed. [**Emphasis added. See note on the top of page A-17, *infra*.**]*
>
> (3) The judges, en banc, shall by local rule provide procedures for the timely collection, deposit, and accounting of the bail bond fee.
>
> C. The clerk of court and the sheriff shall place all sums collected or received under this Section in a separate account to be designated as the Judicial Expense Fund for the Twenty-Fourth Judicial District Court. The judges, en banc, of the Twenty-Fourth Judicial District shall have control over the fund and all disbursements made therefrom. They shall cause to be conducted annually an audit of the fund and the books and where it shall be available for public inspection.

* Enacted by Act 158 of 1989, eff. Sept. 3, 1989. L.R.S. 13:994(8) was amended in 1990 to delete the last sentence of subparagraph B(2) (which provided for refund of the fee to defendants determined to be not guilty or if the charges were dismissed). Act 72 of 1990, eff. Sept. 7, 1990.

L.R.S. 13:1384, applicable to Orleans Parish, provides:

A. In those parishes of five hundred thousand or more population, there is hereby imposed a fee on each bond issued which is conditioned upon the appearance of the defendant in a criminal matter, including cash, property, and appeal bonds, in the amount of two percent of the face value of the bond or twenty dollars, whichever is the greater amount. The fee is to be paid by the bondsman who issues the bail bond, unless otherwise provided herein. The fee shall apply to bail bonds for all criminal offenses, except traffic offenses and municipal offenses which may be tried in the municipal or traffic courts in such parishes. This fee is imposed for the purpose of funding the administration and forfeiture of such bonds .

B. The fee shall be paid by the defendant when a cash or property bond is posted. If the defendant is released on his own recognizance the fee shall be twenty dollars. When the court finds the defendant is indigent and entitled to have counsel appointed, the court may waive the fee on any bond that was not issued or posted by a professional bondsman.

C. The criminal district court for any such parish shall be court rule provide procedures for the timely collection, deposit, and accounting of the fee imposed by this Section. All fees collected shall be deposited in the criminal court cost fund of the criminal district court of any such parish.

Enacted by Act 419 of 1988, eff. Sept. 9, 1988.

L.R.S. 13:996, applicable to Terrebonne Parish,

in pertinent part:

> B.(l) In addition to all other fees or costs now or hereafter provided by law, there is hereby imposed a fee on each bail bond issued which is conditioned upon the appearance of the defendant in a criminal matter in the Thirty-second Judicial District, including cash, property, and appeal bonds, in the amount of two percent of the face value of the bond or twenty dollars, whichever is the greater amount. The fee shall be paid by the bondsman who issues the bail bond, unless otherwise provided herein. The fee shall apply to bail bonds for all criminal offenses. This fee is imposed for the purpose of funding the administration and forfeiture of such bonds.
>
> 2) The fee shall be paid by the defendant when a cash or property bond is posted. If the defendant is released on his own recognizance, the fee shall be twenty dollars. If the court finds the defendant is indigent and entitled to have counsel appointed, the court may waive the fee on any bond that was not issued or posted by a professional bondsman.
>
> (3) The judges, en banc, shall by local rule provide procedures for the timely collection, deposit, and accounting of the bail bond fee.
>
> C. The clerk of court shall place all sums collected or received under this Section in a separate account to be designated as the Judicial Clerk's Fund for the Thirty-second Judicial District Court. The judges, en banc, of the Thirty-second Judicial District shall have control over and administer the funds and all disbursements made therefrom.

Enacted by Act 72 of 1900, eff. Sept. 7, 1990.

State of Louisiana
DEPARTMENT OF JUSTICE

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL

7TH FLOOR
2-3-4 LOYOLA BUILDING
NEW ORLEANS 70112-2096

June 21, 1991

Denise LeBoeuf, Esq. BY HAND
Glass & Reed
338 Lafayette Street
New Orleans, LA 70130

RE: STATE OF LOUISIANA vs. JOHN JONES AND CAROL JONES

Dear Denise:

Enclosed please find the check of the Orleans Parish Criminal District Court for $1500.00 returning the La. R.S. 13:1384 bond fee paid by Carol Jones in connection with the above-captioned matter.

It is the contention of the judges of the Orleans Parish Criminal Court and the Attorney General that this tender brings the case to a close on the basis of mootness as the only matter pending before the Court is your Motion for Return of the Bail Bond Fee. I understand from my conversation with John Reed and Judge Huff you take the position that you are entitled to argue the constitutionality of the bond fee statute despite the fact that tender of this check moots your underlying motion. I will see you on June 28, 1991 at 9:00 AM in Judge Winsberg's Section so that we may argue these issues to Judge Huff.

Sincerely,

WILLIAM J. GUSTE, JR.
Attorney General

PATRICIA HALLEY BOWERS
Assistant Attorney General

PNB:atb
Enclosure

cc: Honorable Frank A. Marullo

ORLEANS PARISH CRIMINAL DISTRICT COURT

COST FUND

% JUDICIAL ADMINISTRATOR

2700 TULANE AVENUE, SUITE 200

NEW ORLEANS, LOUISIANA 70119

1009

6/24 19 91

14-6/550

PAY TO THE ORDER OF CAROL JONES $ 1,500.00

*****ONE THOUSAND FIVE HUNDRED AND 00/100******* DOLLARS

First NBC First National Bank Of Commerce

New Orleans, Louisiana 70119

⑈001009⑈ ⑆065000029⑆ 7003 41536⑈

THE SUPREME COURT OF THE STATE OF LOUISIANA

STATE OF LOUISIANA

VS.

JOHN JONES, CAROL JONES

NO. 91-KD - 1569

IN RE: Jones, John; Jones, Carol: - Defendant(s); Applying for Supervisory and / or Remedial Writs; Parish of Orleans Criminal District Court Div."C" Number 323-569.

October 4, 1991

Granted. This case is remanded to the trial court and it is hereby ordered to expeditiously conduct an evidentiary hearing on plaintiff's motion and to decide the constitutional issues raised.

LFC
PFC
WFM
JLD
HTL

WATSON,.J. would deny the application, believing the matter is moot because of the federal court order.

HALL, J. dissents from the order.

Supreme Court of Louisiana
October 4, 1991

S/FRANS J. LABRANCHE, JR.
Clerk of Court
for the Court

OCT 17 1994

NO. 94-531

In the Supreme Court of the United States

OCTOBER TERM, 1994

STEVEN AUGUSTUS, ET AL.
PETITIONERS

V.

STATE OF LOUISIANA, THROUGH ITS GOVERNOR, EDWIN EDWARDS, ET AL.
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Patricia Nalley Bowers (Counsel of Record)
Bar Roll No. 3341
Herbert B. Bowers, III
Bar Roll No. 3340
Bowers & Bowers
2505 Place St. Charles
201 St. Charles Avenue
New Orleans, Louisiana 70170
(504) 522-3340

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Whether it is true that six out of seven of petitioners' questions are not appropriate for this court on application for writ of certiorari, because they were not raised in a timely fashion in the courts below, thereby defeating jurisdiction in this Court.

2. Whether it is true that four out of seven of petitioners' questions are not appropriate for this court on application for writ of certiorari, because, under this Court's Rule 10 and the case law interpreting it, those questions can be seen as being decided below not on a federal question, but on state law procedural considerations, thereby defeating jurisdiction in this Court.

3. Whether it is true that this case turned below on state law concepts of sovereign and judicial immunity, not federal questions, and thus is not eligible for review on certiorari in this court, because jurisdiction thereby has been defeated.

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CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV (Section 1):

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On November 28, 1990, plaintiffs filed a class action suit in the United States District Court for the Eastern District of Louisiana, Number 90-4667, entitled *Steven Augustus, et al. v. the Honorable "Buddy" Roemer, et al.*, asking that La. R.S. 13:994 (B)(1)(2)(3) & (C), the 2% bail bond fee statute relating to Jefferson Parish (County), be declared unconstitutional; that enforcement of the statute be enjoined; and that all money collected pursuant to the statute be returned. Later, other similar suits were filed challenging an older version of the statute relating to Jefferson Parish and similar statutes relating to Orleans and Terrebonne Parishes (La. R.S. 13:1384 (A), (B), and (C) and 13:996 (B)(1)(2) & (3) and (C) respectively).

The four cases were consolidated for trial on the merits[1] and preliminary injunction. After submission of documents and oral argument, the federal court on July 17, 1991 ruled that all four statutes were unconstitutional on their faces, based on the United States Constitution, and enjoined their further enforcement. However, the Court was silent on plaintiffs' request for return of the 2% fees already collected. A final judgment was entered on July 24, 1991.

No motion for reconsideration or clarification of the "return the money already collected" issue was filed, nor was a motion for new trial ever filed. An appeal to the

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[1] By agreement the constitutionality of the statutes as applied was reserved for consideration at a later date only if the statutes were found to be constitutional on their faces.

United States Fifth Circuit Court of Appeals was filed by defendants, but later voluntarily dismissed before briefing or oral argument. All four cases are carried on the docket of the Eastern District of Louisiana as "closed". Plaintiffs filed no motion for attorneys' fees for work done on the case, although the fees issue was resolved informally earlier in 1994.

The same *Augustus, et al., Sierra, et al., Johnson, et al., and Saulsberry, et al.* criminal defendants/plaintiffs from federal court, along with plaintiff bondsmen, who were not formal parties to the federal litigation, through a suit filed on January 16, 1992, then sought a declaration in the state court system that the same statutes were unconstitutional under not only the federal, but also the state constitution, and once again sought the return of the 2% fees collected prior to the declaration of unconstitutionality, along with attorneys' fees for litigating these issues in the state court system. (Documents Lodged with Clerk, Item A, hereinafter DL, A at ____(p).____)

The Governor of Louisiana and the judges of the 24th Judicial District Court, the 32nd Judicial District Court, and Orleans Parish Criminal District Court (Louisiana trial courts), and Judge Waltzer of the state Fourth Circuit Court of Appeal, (formerly a judge in Orleans Parish Criminal District Court), all made defendants to the state court proceedings, filed in the district court peremptory exceptions under Louisiana law of prescription, *res judicata*, and no right and/or cause of action (DL, B) and joined (DL, C) in additional exceptions originally filed on behalf of the judges of the 24th Judicial District Court

alone by the McGlinchey firm, (DL, D)[2]

Judge Bailes, sitting by designation of the Louisiana Supreme Court as an *ad hoc* judge of the 24th Judicial District Court, received original (DL, B and D), opposition (DL, E), and reply (DL, F and G) memoranda of counsel and a Supplemental Petition (DL, H), and conducted oral argument on the exceptions. As a result, after due consideration, Judge Bailes dismissed plaintiffs' case, primarily because plaintiffs stated no cause of action in tort or *quasi* tort; because even if they stated a cause of action in tort or *quasi* tort such an action[s] would be prescribed; because the judges have immunity from tort liability; because plaintiffs did not state a cause of action under Louisiana Civil Code Article 3494; because the plaintiffs did not state a cause of action of action under Louisiana Civil Code Article 2301 or any other *quasi* contractual theory; and because the plaintiffs, even if they did state a valid *quasi* contractual theory, are barred from using said theory on the basis of sovereign immunity since the funds at issue are state funds. See Reasons for Judgment. (DL, I)

Plaintiffs lodged a timely appeal and defendants

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[2] Undersigned counsel represents all of the defendants, including the judges of the 24th Judicial District Court, the judges of the 32nd Judicial District Court, the judges of Orleans Parish Criminal Court, and the State of Louisiana, through its governor, Edwin Edwards. However, the judges of the 24th Judicial District Court have also called upon their insurance carrier to provide additional representation, and, thus, have two sets of counsel, the firm of undersigned counsel and the McGlinchey firm. Accordingly, all defendants (represented by undersigned counsel) hereby adopt the arguments made to this Court by the McGlinchey firm in its brief in opposition to writ application as though copied herein *in extenso,* in addition to the arguments made by their own counsel herein.

answered that appeal. After briefing (DL, K, L, and M), but no oral argument, the granting of exceptions and dismissing of the case by the district court was affirmed. (DL, N) The Fifth Circuit reasoned

> (1) that judicial immunity protects the judges, because they were clearly performing functions integral to the judicial process when they set the bonds on which the fees were assessed (DL, N at 4);
>
> (2) that plaintiffs are not entitled to a mandamus or mandatory injunction because there is no statutory provision for the refund of the bail bond fees (DL, N at 4); and
>
> (3) that sovereign immunity applies because this is not a suit in contract or tort and plaintiffs did not receive the permission of the Legislature to file the suit. (DL, N at 4-5)

Plaintiffs next filed a writ application to the Louisiana Supreme Court (DL, O). Oppositions were filed by the defendants (DL, P and Q) and, in due course, the application for writ was denied by the Louisiana Supreme Court without reasons by a vote of four to three. (DL, R) Subsequent thereto plaintiffs filed the instant writ application to this Court.

However, pursuant to Rule 15.1 of this Court which admonishes counsel that they "have an obligation to the Court to point out any perceived misstatements", the following comments are made regarding the Statement of the Case provided by petitioners. Petitioners attempt,

through innuendo, in their statement of the Case, to bolster the first argument that they make, namely that the entire Louisiana judiciary is in some mysterious way unfair and tainted. Plaintiffs imply that they did not get a fair hearing of their issues without specifying exactly why, (a) because judges are elected in Louisiana, (b) because the money at issue was collected in two of the largest parishes (counties) in Louisiana, (c) because the Louisiana Court of Appeals which heard this case shares a courthouse with one of the defendant district court judiciaries, and (d) because the Louisiana Court of Appeals which heard this case issued an unpublished opinion. (Petitioners' Writ Application, pages 6-7, hereinafter PWA at ____(p.)____)

In like vein, petitioners imply fundamental unfairness, because there was no evidentiary hearing on the exceptions (PWA at 7) when under Louisiana Code of Civil procedure, Article 931,[3] no evidentiary hearing is allowed on a peremptory exception of no cause of action and petitioners did not even request an evidentiary hearing as to that exception or any other. (DL, E)

Petitioners also imply fundamentally unfair treatment at the hands of the Louisiana Supreme Court, because it granted writs in *State v. Jones,* 586 So.2d 521 (La. 1991), but not in this case. (PWA at 7) Petitioners neglect to mention, however, that the *State v. Jones* application was made in a *criminal* case. The Louisiana Supreme Court made no statement in *State v. Jones* as to whether the criminal defendant therein had a civil cause

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[3] Article 931 states in pertinent part: "No evidence may be introduced at any time to support or controvert the objection that the petition fails to state a cause of action."

of action for determination of constitutionality of the Orleans 2% statute under the Louisiana Constitution when there had already been a declaration of unconstitutionality by the federal court[4] or a civil cause of action for return of the money collected before the statute was declared unconstitutional. (DL, S)

Finally, in regard to the identification of misstatements under Rule 15.1 of this Court, respondents point out that petitioners have "sinned by omission" in regard to the strictures of Rule 14.1 (h) as to detailed identification of the places in the record below where they raised the federal questions on which they seek review on application for certiorari. Respondents can only assume that this was a purposeful omission on the part of petitioners since every time they lost in the courts below, in contravention of what is required for review in this Court under Rule 14.1 (initial and constant review by the state court system of all federal questions sought to be heard by this Court), they added another handful of new arguments. This failure to raise federal questions properly and consistently in the courts below not only made the litigation in the courts below more difficult and time consuming for defendants and the courts who were required to hear these issues, but also provides the central theme of respondents' brief in opposition: Petitioners' failure to raise federal questions prop-

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[4] A long line of civil cases mandates that the Louisiana Supreme Court not decide unnecessary constitutional issues and not take up redundant issues. *State v. Stripling*, 354 So.2d 1297, 1300 (La. 1978) and cases cited therein. See also *Diaz v. Allstate Ins. Co.*, 433 So. 2d 699 (La. 1983); *Benson & Gold Chevrolet, Inc. v. La. Motor Vehicle Commission*, 403 So.2d 13 (La. 1981); *State v. Cryer*, 263 So.2d 895 (La. 1972); *Tafaro's Ins. Co. v. Division of Housing Imp.*, 259 So.2d 57 (La. 1972) and *Aucoin v. Dunn*, 233 So.2d 530 (La. 1970).

erly below deprives this Court of jurisdiction to hear this case on application for writ of certiorari.

SUMMARY OF THE ARGUMENT

This Court lacks jurisdiction over the issues which petitioners seek to have heard on writ of certiorari. Rule 14.1 (h) of this Court, its predecessor rule, and the case law interpreting same require that in order for this Court to hear a matter on certiorari it must present a federal question and must have been raised properly in the state courts below. The questions presented by petitioners' application for writ of certiorari do not meet this test.

Petitioners' first and second arguments were not raised until this application for writ of certiorari. Petitioners' third, fourth, fifth, and seventh arguments were not raised in a sufficient and adequate manner until either the state court of appeal or the Louisiana Supreme Court, thereby defeating their right to have them heard in this Court. Furthermore, Louisiana law also requires adequate raising in order to preserve rights. Thus, the silence of the Louisiana Supreme Court in regard to the third, fourth, fifth, and seventh arguments should be interpreted under *Ellis v. Dixon,* 349 U.S. 458, 75 S.Ct. 850 (1955) as a rejection of the arguments for failure to properly raise, making decision of them turn on state procedural law as opposed to the federal question required for review in this Court and thereby defeating jurisdiction.

Leaving aside for a moment the initial problems presented by the failure of petitioners to properly raise their arguments in the state courts below, this writ applica-

tion must also be rejected for lack of jurisdiction, because it turned below on state law questions of judicial and sovereign immunity, not federal questions. Petitioners' only escape from this quicksand is to prove that they had a valid and *appropriately raised* federal question which would have defeated the state law concepts of judicial and sovereign immunity. This they cannot do.

In regard to judicial immunity, the state courts found that petitioners had conceded its effectiveness in protecting the defendant judges except if petitioners had a valid mandamus or mandatory injunction argument. The state courts found that they did not and the reasons that petitioners present now to support the idea that they did have such arguments were not presented to the state courts in a timely fashion. Thus, without even discussing the idea that petitioners' arguments to this Court in regard to a valid mandamus or mandatory injunction cause of action are correct (which is specifically denied), it is apparent that the state courts' decisions on the judicial immunity issue, *based on the arguments in front of them at the time,* were correct and must stand undisturbed by this Court as valid actions of a state court system deciding an issue based on state law concepts.

A similar analysis holds true in regard to the state courts' decisions regarding sovereign immunity. The State of Louisiana has waived its immunity only in cases involving tort, contract, or a specific waiver of immunity by the Legislature. No one contends that there was a specific waiver by the Legislature. The arguments of the petitioners in the courts below show conclusively that they never argued anything other than state law as a basis for

a contractual cause of action, thus there can be no federal contractual cause of action to defeat the State law concept of sovereign immunity.

Petitioners' only recourse is to prove a valid cause of action for a federal tort so as to defeat the state law concept of sovereign immunity. Petitioners assert such a federal constitutional tort by analogy to *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc.*, 403 U.S. 388, 91 S.Ct. 1999 (1971) in which a federal tort was found to exist based on a warrantless entry and trespass. As the state courts have already pointed out though, that is not analogous to the situation at bar. In *Bivens,* the actions of the FBI agents, on which the tort was based, were illegal at the time they were committed. Here the actions of the judges in collecting these fees were constitutional at the time they were taken and indeed the judges were entitled by a long line of both federal and state cases to presume that their actions taken pursuant to the statute were constitutional. Thus, the state courts were correct in finding that no federal constitutional tort existed so as to defeat the state law concept of sovereign immunity.

Accordingly, this case was decided appropriately by the state court below on the state law concepts of sovereign and judicial immunity, not federal questions. The petitioners' application for writ of certiorari must be denied for lack of jurisdiction.

ARGUMENT

I. SIX OUT OF SEVEN OF PETITIONERS' QUESTIONS ARE NOT APPROPRIATE FOR THIS COURT ON APPLICATION FOR WRIT OF CERTIORARI, BECAUSE THEY WERE NOT RAISED IN A TIMELY FASHION IN THE COURT BELOW.

Precedent at least forty (40) years old establishes that issues not raised below may not be heard in this Court upon application for writ of *certiorari*. *Ellis v. Dixon*, 349 U.S. 458, 460, 75 S.Ct. 850, 851 (1955) ("The question...was not raised below, and hence is not open here.") See also this Court's Rule 14.1(h) which provides in pertinent part:

> If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary therof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari.

Petitioners' first argument is that it was impossible

for them to get a fair, impartial hearing before the various levels of the Louisiana judiciary. (PWA at 9-11) However, when the petitioners left the federal trial court with a judgment in hand that held the underlying statutes unconstitutional, but which was silent as to the "return of the money collected" issue, they faced a choice. They could have either applied for further relief in the federal trial court to get the money returned or they could have filed a new suit in the state court system seeking the same relief. It was their choice to file in the state court system. If they thought they could not get a fair hearing from *anyone* in the Louisiana judiciary, they should not have filed there.

Alternatively, if they still wanted to take their chances with the Louisiana judiciary, they should have raised this issue all along the judicial route: in the district court, in the appellate court, and in the Louisiana Supreme Court. Their failure to raise this issue until now precludes its hearing under *Ellis, supra* and Rule 14.

Similarly, this Court lacks jurisdiction to review petitioners' second argument, that the Louisiana Supreme Court failed to recognize a Fifth Amendment cause of action for the return of property taken for public use without just compensation (PWA at 12-13), because petitioners raise it for the first time in their application to this Court for a writ of certiorari. While it is true that the petitioners have always argued that the judges took their money wrongfully, they have never before made the argument that their property was taken for public use in violation of the Fifth Amendment. That argument appears neither in their Petition (DL, A), Amended Petition (DL, H), Memorandum in Opposition to Exceptions in the trial

court (DL, E), appellate original and reply briefs (DL, J and M), or application to the Louisiana Supreme Court for a writ of certiorari (DL, O). Thus, review of the question is barred in this Court.

Petitioners' third argument, that the Louisiana Supreme Court failed to recognize a cause of action based on the right to return of funds under the Fourth Amendment, mandating a review in this Court (PWA at 13-14), is also without merit. The Louisiana Supreme Court did not address petitioners' argument in that regard for the same reason that so many of the arguments petitioners wish to make in this Court are inappropriate on application for certiorari. The argument was not appropriately dealt with by petitioners in the courts below the Louisiana Supreme Court.

While the Fourth Amendment was mentioned in passing in petitioners' Supplemental Petition (DL, H at 3) it was not briefed or argued to either the state district court or the court of appeals (DL, E. J. and M). In seeking to raise it for the second time in passing in their writ application to the Louisiana Supreme Court (DL, O at 14), petitioners ignored the basic tenet of Louisiana law that new issues may not be raised for the first time on appeal. See *Uniform Rules of Courts of Appeal*, Rule 1-3. Scope of Review; *Williams v. Williams*, 586 So.2d 658 (La. App. 2 Cir. 1991); Big River Construction v. Univ. Club I Apartments, 598 So.2d 542 (La. App. 1 Cir. 1992); *Krauss Co. v. Develle*, 110 So.2d 104 (La. 1959); *Fried v. Bailey*, 52 So.2d 247 (La. 1951); *Dier v. Hamilton*, 600 So.2d 117 (La. App. 2 Cir. 1992) (Statute not raised below could not be raised for first time on appeal.); and *Great Southern Life Ins. Co.*

v. Lebreton, 540 So.2d 1306 (La. App. 5 Cir. 1989).

Note especially *Williams, supra*, wherein the Court held that despite defendant raising the issue in his answer, lack of presentation of the whole issue to Court at trial and the Court's resultant ruling on a narrower version of the issue mandated limiting the appeal to a narrow version of the issue and barring on appeal the more general version of the issue. Accordingly, petitioners waived in the Louisiana Supreme Court any claim that may have been stated regarding the Fourth Amendment in their Supplemental Petition by failing to brief and argue this issue to the district and appellate courts when the defendants' exceptions were filed, heard, and reviewed, resulting in lack of jurisdiction in this Court.

Petitioners' fourth argument, that the state courts denied due process under the Fourteenth Amendment to non-convicted arrestees (PWA at 15-16), was not raised properly below either, and, thus, may not be heard in this Court. While the text of the applicable statute (Old Jefferson) was quoted in the original Petition (DL, A at 5, n.2) and the old Jefferson statute is mentioned in petitioners' memorandum in opposition to exceptions (DL, E at 1, n.2 and 16), there is absolutely no mention in the trial court of the argument that the state court system's failure to apply the provisions of the old Jefferson law regarding non-convicted arrestees constituted arbitrary and capricious action under the Fourteenth Amendment.

Similarly, while the allegation is made in petitioners' original and reply briefs to the state appellate court (DL, J at 5 and M at 3) that the money should be paid back to the non-convicted arrestees under the provisions of the old Jef-

ferson law, there is absolutely no reference to "arbitrary and capricious", "due process", and/or the "Fourteenth Amendment" in petitioners' briefs to the state appellate court. Thus, under *Williams, supra*, it was inappropriate for the Louisiana Supreme Court to consider this issue, thereby precluding any consideration here.

Petitioners' fifth argument, that the Louisiana Supreme Court did not recognize its Fourteenth Amendment equal protection argument mandating a review of that argument in this Court (PWA at 16-17), falls under the same logic. The equal protection issue was not briefed or argued to either the state district court or the court of appeals and this was pointed out by the defendants in their brief to the Louisiana Supreme Court. (DL, Q at 3-5) In the lower Louisiana courts, petitioners filed five substantive documents: a petition, a memorandum in opposition to defendants' exceptions, a supplemental petition, an original brief, and a reply brief. While the term *14th Amendment* was used in petitioners' original petition at page 24 and in the supplemental petition at page 3 and reference was made to the Equal Protection clause of the *Louisiana* Constitution (although not the U.S. Constitution) at page 25 of the original petition, petitioners made no argument in regard to a valid equal protection claim defeating defendants' exceptions when they filed their memorandum in opposition to the exceptions (DL, E).

Similarly, petitioners made no argument to the Court of Appeals in either their original or supplemental briefs on the topic of equal protection (DL, J and M). Accordingly, petitioners waived in the Louisiana Supreme Court any claim that may have been stated regarding equal

protection in their petitions by failing to brief this issue to the district court and the state appellate court. Thus, they were barred from raising equal protection for the first time on writ application to the Louisiana Supreme Court and that Court was barred from hearing it, making it less than surprising that it did not rule on the argument and making it ineligible for argument in this Court.

Petitioners' seventh argument, that the Louisiana Supreme court failed to recognize that they had a cause of action as to the unconstitutionality of La. R.S. 47:1401 *et. seq.* under the due process clause (PWA at 18-27), fails for the same reason. The unconstitutionality of La. R.S. 47:1401 et seq. was never raised until petitioners' application for writs to the Louisiana Supreme Court (DL, O), and, thus, was not appropriately heard by that court and is not appropriately heard by this Court for the reasons discussed above. The failure to raise was originally argued to the Louisiana Supreme Court by the McGlinchey brief (DL, P at 9), which was adopted by all defendants. (DL, Q at ii).

II. FOUR OUT OF SEVEN OF PETITIONERS' QUESTIONS ARE NOT APPROPRIATE FOR THIS COURT ON APPLICATION FOR WRIT OF CERTIORARI, BECAUSE, UNDER RULE 10 AND THE CASE LAW INTERPRETING IT, THOSE QUESTIONS CAN BE SEEN AS BEING DECIDED BELOW NOT ON A FEDERAL QUESTION, BUT ON STATE LAW PROCEDURAL CONSIDERATIONS.

As this Court is well aware, Rule 10 of this Court (formerly Rule 17) requires that matters coming to this Court from a State's highest court on application for a writ of certiorari turn on a question of federal law. Decisions of the state court system that rest on state law as opposed to

federal law may not be disturbed by this Court since it lacks jurisdiction to review them. *Ellis, supra*, 349 U.S. 463-464, 75 S.Ct. at 854. Thus, four out of petitioners' seven arguments are disqualified for hearing on certiorari in this Court for lack of a federal question because they can be deemed to have been disqualified for hearing in the Louisiana Supreme Court by the Louisiana procedural rules cited in Section I. above, not by any adverse federal question decision.

> The four arguments so disqualified are petitioners':
>
> third argument, that the Louisiana Supreme Court failed to recognize a cause of action based on the right to return of funds under the Fourth Amendment;
> fourth argument, that the state courts denied due process under the Fourteenth Amendment to non-convicted arrestees;
> fifth argument, that the Louisiana Supreme Court did not recognize its Fourteenth Amendment equal protection argument; and
> seventh argument, that the Louisiana Supreme Court failed to recognize that they had a cause of action as to the unconstitutionality of La. R.S. 47:1401 *et seq.* under the due process clause.

III. THIS CASE TURNED BELOW ON STATE LAW CONCEPTS OF SOVEREIGN AND JUDICIAL IMMUNITY, NOT FEDERAL QUESTIONS, AND THUS IS NOT ELIGIBLE FOR REVIEW ON CERTIORARI IN THIS COURT.

This case comes to this Court on denial of a writ of certiorari from the Louisiana Supreme Court to the Louisiana Fifth Circuit Court of Appeals. The Louisiana Supreme Court denied writs without reasons. Thus, one must assume that the majority of the Louisiana Supreme Court felt that it was improvident to grant the application for writ for the procedural reasons cited above (failure to raise questions properly below) and/or considered the reasoning of the courts below to be correct.

Since both the Louisiana district court and the Louisiana appellate court based their dismissal and affirmance of dismissal respectively on the state law concepts of sovereign immunity and judicial immunity[5], the case did not turn on a federal question which can be reviewed in this court. The only exception to this rule would be if a federal cause of action existed *and was properly asserted* which would have defeated sovereign and/or judicial immunity. We examine each concept in turn.

The Fifth Circuit, which issued the last written

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[5]Even if these concepts of sovereign and judicial immunity were incorrect, under Louisiana law, a judgment may be justified by any reason that was argued to the court issuing the judgment. La. Code of Civil Procedure, Article 2133 (B); *Roger v. Estate of Moulton*, 513 So.2d 1126, 1135-37 (La. 1987) (on rehearing); and *Succession of Doll v. Doll*, 593 So.2d 1239, 1243-44 (La. 1992) Thus, all the alternative concepts supporting the dismissal which were argued by the defendants to the Louisiana courts, including but not limited to *res judicata*, prescription, and no right/no cause of action support the judgments of the Louisiana courts. However, because they were not relied on exclusively by the Louisiana lower courts, who chose instead to focus on judicial and sovereign immunity, respondents do not discuss them here. The right to argue them as additional support for the actions of the Louisiana courts is reserved in the event that this Court decides that it is appropriate to grant a writ of certiorari (which is specifically denied).

reasons in this case, based its judicial immunity finding on the state law case of *Moresi v. Department of Wildlife & Fisheries,* 567 So.2d 1081 (La. 1990). As petitioners had conceded that they were not eligible for damages, because of judicial immunity (DL, J at 6-7), their only recourse was to argue that a mandamus action or mandatory injunction supported return of the money. The Fifth Circuit found, however, that there was no statutory authorization to support such a mandatory action. While petitioners now argue a variety of items as support for such a mandatory action so as to defeat judicial immunity, as discussed above in Section I. and II., those arguments were not made to the Fifth Circuit, and, thus, did not have to be considered by the Fifth Circuit, even if they are correct (which is specifically denied).

Thus, as the case was heard by the Fifth Circuit and reviewed on application for certiorari to the Louisiana Supreme Court, there was no statutory authorization for the return of the money so as to provide the basis for a mandamus or mandatory injunction which would defeat judicial immunity. Accordingly, the Fifth Circuit's decision that the state law concept of judicial immunity was applicable and the Louisiana Supreme Court's refusal to grant writs as to that decision must stand undisturbed by this Court as valid interpretations of Louisiana law which do not provide the federal question jurisdiction necessary in this Court for a writ of certiorari.

Similarly, the Fifth Circuit based its decision on sovereign immunity on the state law provision regarding same found in the Louisiana Constitution of 1974 which provides in Article XII, Section 10 in pertinent part as

follows:

> (A) No immunity in Contract and Tort.
> Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property.
>
> (B) Waiver in Other Suits.
> The legislature may authorize other suits against the state, a state agency, or a political subdivision. A measure authorizing suit shall waive immunity from suit and liablility.

Petitioners have never asserted that they had the permission of the Louisiana Legislature to file this suit. Thus, in order to escape sovereign immunity they had to prove that they had a valid claim in contract or tort.

The various memoranda and briefs of the petitioners (DL, E at 3, 16; J at 3, 5-6, 8-9; M at ii, 1-4,6; and O at 8, 10-11, 14-17) make it clear that they have never urged that they had a contractual cause of action based on anything other than state law. Federal law as a basis for a contract was never discussed. Thus, petitioners' only recourse in this Court is to show that they have some valid grounds to prove a federal tort. Otherwise, they cannot defeat the state trial court's and state Fifth Circuit's decisions, bolstered by the Louisiana Supreme Court's denial of writs, that there was no valid cause of action in tort so as to defeat sovereign immunity.

Petitioners assert that they have such a cause of action for a federal constitutional tort by analogizing to the

case of *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc.*, 403 U.S. 388, 91 S.Ct. 1999 (1971). However, citation of this case raises the issue pointed out by the state trial court when it commented that "[p]laintiffs have cited no case to this court which holds that the collection of a fee authorized by a statute, subsequently declared unconstitutional, is a tort against the person who paid the fee." (DL, I at 2) In *Bivens*, the underlying complained of action, warrantless entry and trespass respectively, was unlawful *at the time the action was taken.*

This is a radically different concept than the one that plaintiffs urge here wherein they ask this Court to hold that an action, lawful at the time taken, should retroactively be considered a tort, because of a subsequent declaration of unconstitutionality. In the situation currently at bar, the various judges were having a fee collected under a statute presumed not only by themselves, but also by both federal and state law to be constitutional until otherwise proven. *Schwegmann Bros. v. Calvert Distillers Corp.*, 184 F.2d 11 (5th Cir. 1950), rev. on other grounds 341 U.S. 384, 71 S.Ct. 745 (One who asserts rights under a state statute need not prove as a condition precedent to its enforcement that legislature had right to enact it and he may stand on presumption of validity until such presumption is overthrown.); *Bayou Des Familles Development Corp. v. U.S. Corps of Engineers*, 541 F.Supp. 1025 (E.D.La. 1982); *LaBauve v. Louisiana Wildlife & Fisheries Com'n*, 444 F.Supp. 1370 (E.D.La. 1978); *State v. Griffin*, 495 So.2d 1306 (La. 1986); *State v. Union Tank Car Co.*, 439 So.2d 377 (La. 1983); *Smith v. Datachem, Inc.*, 540 So.2d 1282 (La. App. 5 Cir. 1989).

Accordingly, *Bivens* does not support the proposition that the judges committed a tort by proceeding with collection under the statute until it was declared unconstitutional and petitioners have not stated a cause of action for a federal constitutional tort so as to defeat the finding of the state court system that sovereign immunity governs this situation.

CONCLUSION

For the reasons stated above, petitioners' application for a writ of certiorari should be denied.

Respectfully submitted,

Patricia Nalley Bowers[6]
Bar Roll No. 3341
Herbert B. Bowers, III
Bar Roll No. 3340
Bowers & Bowers
2505 Place St. Charles
201 St. Charles Avenue
New Orleans, Louisiana 70170
(504) 522-3340

[6] Counsel of record

Supreme Court, U.S.
FILED
OCT 21 1994
OFFICE OF THE CLERK

No. 94-531

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

STEVEN AUGUSTUS, *et al.*,
Petitioners,

v.

STATE OF LOUISIANA, THROUGH ITS GOVERNOR, EDWIN EDWARDS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Louisiana

---

RESPONDENTS' BRIEF IN OPPOSITION

HENRI WOLBRETTE, III
Counsel of Record
ROGER C. LINDE
JAMES GARNER
McGLINCHEY STAFFORD LANG
A Law Corporation
643 Magazine Street
New Orleans, LA 70130
(504) 586-1200
Attorneys for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

(1) Whether the Louisiana Supreme Court acted properly when it denied the application for writs of certiorari and mandamus and supervisory and remedial writs on a decision of the Louisiana Court of Appeal for the Fifth Circuit which found that the judges of the Twenty-Fourth Judicial District Court, Parish of Jefferson, are judicially immune from a suit against them to return the fees collected pursuant to La. Rev. Stat. § 13:994.

(2) Whether the statute of limitation properly bars petitioners' actions.

(3) Whether the Louisiana courts acted properly when they failed to find that the petition stated a cause of action under the due process clause and 42 U.S.C. § 1983 because of La. Rev. Stat. § 47:1401 *et seq.*

(4) Whether the petitioners stated any cause of action for a federal constitutional tort.

(5) Whether defendants' exceptions of no right of action should have been denied because of defendants' sovereign immunity.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-531

STEVEN AUGUSTUS, *et al.*,
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v.

STATE OF LOUISIANA, THROUGH ITS GOVERNOR, EDWIN EDWARDS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Louisiana

---

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On April 12, 1991, petitioners filed an action under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Louisiana (hereinafter the "Federal Court Case") seeking a declaratory judgment and injunctive relief and alleging that the judges of the Louisiana Twenty-Fourth Judicial District Court ("24th JDC Judges") had violated plaintiffs' civil rights under color of law by implementing and enforcing the provisions of La. Rev. Stat. § 13:994.[1] The injunctive relief

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[1] La. Rev. Stat. § 13:994 imposes a two percent fee on all bail bonds. Petitioners also made similar claims which affected judges in Orleans Parish and Terrebonne Parish.

sought was two-fold: A mandatory injunction ordering the judges to return collected fees and a prohibitory injunction ordering the judges to cease enforcing the statutes. Plaintiffs further sought attorney's fees pursuant to 42 U.S.C. § 1988. The plaintiffs moved for a preliminary injunction with regard to enforcement of the statute and the case was tried before the Honorable Henry Mentz on stipulated facts. On July 24, 1991, Judge Mentz rendered judgment in favor of plaintiffs and found that La. Rev. Stat. § 13:994 and the related statutes were unconstitutional. Judge Mentz enjoined the continued enforcement of La. Rev. Stat. § 13:994. The Court did not rule on the issue of attorney's fees. Defendants dismissed their appeal, and plaintiffs never appealed.

Six months later on January 16, 1992, petitioners filed this action against the 24th JDC Judges, judges in Terrebonne Parish and Orleans Parish and others, and sought reimbursement of the collected fees with interest together with attorney's fees. Petitioners further sought class certification and declaratory judgment that La. Rev. Stat. § 13:994 and similar statutes applicable in Orleans and Terrebonne Parish have violated both the United States and Louisiana constitutions. On July 30, 1992, the 24th JDC Judges and all other defendants filed a Preemptory Exception of Res Judicata, Preemptory Exception of Prescription,[2] Preemptory Exception of No Cause of Action and a Preemptory Exception of No Right of Action. The district court maintained the exceptions of no cause of action, no right of action and prescription. The Louisiana Court of Appeals for the Fifth Circuit affirmed the district court's decision and the Louisiana Supreme Court denied writs.

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[2] The Louisiana doctrine of prescription is comparable to the common law statute of limitation.

SUMMARY OF ARGUMENT

The petitioners initiated this "copy cat" proceeding in the Twenty-Fourth Judicial District Court, in which they seek to have statutes declared unconstitutional under the federal and state laws and seek attorney's fees and return of the fees paid. The trial court and the appellate court correctly maintained the exception of no cause of action when they applied the doctrine of judicial immunity. A judge has immunity from such actions taken pursuant to his judicial or legislative duties.

The trial court and the appellate court correctly maintained the exception of no cause of action when they applied the doctrine of sovereign immunity. The only types of suits in which the state's sovereign immunity has been waived are suits in contract or tort. This suit is not a suit in contract or tort.

The trial court correctly maintained the exception of no cause of action. While a federal claim may exist pursuant to 42 U.S.C. § 1988, under Louisiana law there is no cause of action for a constitutional tort.

The trial court correctly applied a one year prescriptive period and found that the suit for constitutional torts was not timely. Regardless of how the appellants now style their causes of action, they clearly brought suit based on the constitutionality of the statutes in question and sought return of the fees. The suit is virtually identical to the federal suit, which they earlier brought, and which is now concluded.

ARGUMENT

Defendants G. Thomas Porteous, Jr., Ernest B. Richards, IV, Susan Chehardy, Walter E. Kollin, Clarence E. McManus, Patrick J. McCabe, M. Joseph Tiemann, Hubert A. Vondenstein, Charles E. Cusimano, II, Jacob L. Karno, Douglas Allen, Robert J. Burns, Allen Oser, Ronald P. Loumiet, Martha Sasson, Jo Ellen Grant and Joseph G. Grefer, Judges of the Twenty Fourth Judicial District Court (collectively "24th JDC Judges"), respectfully submit that the district court properly sustained their Exception of No Right of Action, Exception of No Cause of Action and Exception of Prescription, that the Appellate Court correctly affirmed the decision of the District Court and that the Louisiana Supreme Court correctly denied the writ application.[3]

I. INTRODUCTION

Appellants argue on several grounds that this matter should not have been dismissed.[4] Most of these arguments do not directly relate to the ruling of the District Judge or the ruling of the Appellate Court. The 24th JDC Judges would respectfully direct this Court's attention to the actual exceptions maintained by the District Judge and affirmed by the Appellate Courts. With regard to the 24th JDC Judges, the District Judge found that: (1) judicial immunity bars petitioners' lawsuit; (2) there is no such cause of action under Louisiana state law for

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[3] The district court also maintained the exceptions of the State of Louisiana, the judges of Orleans Parish and the judges of Terrebonne Parish. In order to promote economy, the 24th JDC Judges have not briefed all issues herein, but instead adopt all the arguments contained in the briefs of all co-defendants. More specifically, the 24th JDC Judges adopt the arguments that the plaintiff stated no cause of action for federal constitutional tort, that sovereign immunity bars any claim, and that petitioners state no cause of action for return of any fees.

[4] In this appeal, Petitioners have apparently abandoned many of the grounds for appeal raised in the state proceedings.

a "constitutional tort"; and (3) the one year prescriptive period bars any such constitutional tort. The lower courts found that the doctrine of sovereign immunity and judicial immunity would bar any such action against the 24th JDC Judges.

II. THE DISTRICT COURT AND THE APPELLATE COURT CORRECTLY APPLIED JUDICIAL IMMUNITY AND BARRED ANY CAUSE OF ACTION AGAINST THE 24TH JDC JUDGES

In their suit petitioners seek to recover from the 24th JDC Judges, various Orleans Parish judges and Terrebonne Parish judges and the State of Louisiana amounts paid into the judicial fund and for attorney's fees in bringing this action. The doctrine of judicial immunity bars such a claim in the following three ways:

A. *Judicial Immunity.* Judges enjoy absolute immunity from liabilities for acts performed in their judicial capacities, which extends to all claims except those claims for prospective injunctive relief. *Pulliam v. Allen*, 466 U.S. 522, 541-42, 104 S.Ct. 1970, 1982, 80 L.Ed. 2d 565, 579 (1984).

B. *Legislative Immunity.* When judges are engaged in rulemaking rather than adjudication, they act as legislators. In this capacity judges enjoy absolute immunity from both damage claims and injunctive relief. *Supreme Court of Virginia v. consumers Union*, 466 U.S. 719, 732-33, 100 S.Ct. 1967, 1974-75, 64 L.Ed. 2d 641, 653-54 (1980).

C. *Prosecutory or Administrative Immunity.* Judges may also act in an enforcement capacity, and in such cases they enjoy prosecutory immunity, which insulates them from damages and liability, although not from injunctive relief. *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 736-37, 100 S.Ct., 1967, 1977, 64 L.Ed. 2d 641, 656 (1980).

Indeed, the Louisiana Supreme Court held that when an official performs a function integral to the judicial process or a traditional legislative function, the official is absolutely immune from damage liability for acts performed in those capacities. *See, Moresi v. Department of Wildlife & Fisheries*, 567 So.2d 1081 (La. 1990).

In the federal action, the plaintiffs sought and obtained an injunction which barred the judges from enforcing La. Rev. Stat. § 13:994 and the rules promulgated thereunder. The injunction was clearly directed to the judges in their judicial capacities. *See Pulliam v. Allen, supra*, 466 U.S. at 527-28, 104 S.Ct. at 1972-73, 80 L.Ed.2d at 569-70 (incarceration by justice of peace of defendants who do not post bail treated as a judicial function for immunity purposes). The Court could order the 24th JDC Judges not to enforce the statute. However, in promulgating rules under La. Rev. Stat. § 13:994 for the collection of fees, the judges acted in a legislative capacity and in that capacity there were and are absolutely immune from suit for return of the fees and attorney's fees.

The Court in *Consumers Union* considered a similar situation. In that case, plaintiffs were members of a consumer group which sued the Supreme Court of Virginia to annul the stringent ban on advertisement which the court had mandated in its capacity as the regulatory authority for the Virginia bar. 446 U.S. at 725-26, 100 S.Ct. at 1971, 64 L.Ed.2d at 649. The Supreme Court struck down the Virginia Court's disciplinary rule as unconstitutional. On remand, the plaintiffs moved for costs, including an award of attorney's fees pursuant to 42 U.S.C. § 1988. On certiorari, after remand, the United States Supreme Court explained that the chief justice was properly barred from enforcing the rules, because the Virginia statute gave the state supreme court independent authority to initiate proceedings against attorneys. 446 U.S. at 736, 97 S.Ct. at 1977, 64 L.Ed.2d at 656. However, the District Court had awarded attorney's fees because the Virginia court declined or failed to adopt the

proposal of the Virginia State Bar which implemented the Supreme Court's decision in *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2692, 53 L.Ed.2d 810 (1977) (enforcement of a ban on an attorney advertising violated the first and fourteenth amendment rights of the attorney seeking to advertise fees charged for certain routine legal services). In overturning the award of attorney's fees, the Supreme Court in *Consumers Union* held that the Virginia court was properly enjoined in its enforcement function but that it was improperly assessed with attorney's fees in its legislative function, 446 U.S. at 739, 100 S.Ct. at 1978, 64 L.Ed.2d at 658.

In this case, Judge Mentz entered a declaratory judgment which directed the judges to stop enforcing La. Rev. Stat. § 13:994. In enforcing La. Rev. Stat. § 13:994, the judges only enforced a law which was valid on its face. Clearly there can be no "further relief" based on this declaratory judgment against the 24th JDC Judges for return of the fees.

If the petitioners have no claim against the 24th JDC Judges for return on the fees, the only remaining claim is for attorney's fees. The petitioners have no cause of action against the 24th JDC Judges for attorney's fees. The rule in Louisiana is that attorney's fees are not recoverable except where expressly provided by statute or contract. *Huddleson v. Bossier Bank & Trust Co.*, 475 So.2d 1082, 1085 (La. 1985). Plaintiffs claim they are entitled to attorney's fees under the authority of La. Code Civ. Proc. art. 1878 and/or La. Code Civ. Proc. art. 595 and/or 42 U.S.C. § 1988. None of these statutes create such an entitlement in the instant case. Because the doctrine of judicial immunity bars any claim on the merits, the 24th JDC Judges are immune from suit on the merits and the petitioners cannot recover attorney's fees. *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 762-63, 109 S.Ct. 2732, 2737, 105 L.Ed.2d 639, 649-50 (1989).

Petitioners have argued that the 24th JDC Judges can be subject to mandamus or a mandatory jurisdiction to return the fees in an administrative capacity. Such an argument is without foundation. The only case cited by petitioners is *Imbornone v. Early,* 401 So.2d 953 (La. 1981). The *Imbornone* decision does not address an attempt to collect fees or attorney's fees. Rather, it involves an attempt by one judge to keep his chambers from being taken by another judge. That situation clearly is not an instance of judicial immunity and would be inapplicable in this case. Further, petitioners improperly argue that mandamus or a mandatory injunction can be used to avoid the clear precedent that no damages are recoverable against a judge. Further, there are no damages or fees to be recovered from the 24th JDC Judges. The petitioners paid the fees to the State of Louisiana and the 24th JDC Judges do not possess the funds. As stated by co-defendants, sovereign immunity bars any claim against the state. If plaintiffs have any claims at all, which is denied, they should have submitted these claims to the Louisiana Board of Tax Appeals as asserted by the Appellate Court.

III. PRESCRIPTIVE PERIOD

The District Court ruled correctly when it found that the one year prescriptive period barred any claims for the constitutional torts asserted by petitioners. Challenges to the constitutionality of a state statute under the United States constitution and 42 U.S.C. § 1983, *et seq.*, prescribe in one year. *See Jones v. Orleans Parish School Board*, 688 F.2d 342 (5th Cir. 1982), *rehearing denied*, 693 F.2d 133, *appeal dismissed, cert. denied*, 103 S. Ct. 2420 (1983); *Elzy v. Robinson*, 868 F.2d 793 (5th Cir. 1989); *Perez v. Griffin*, 849 F.2d 172 (5th Cir. 1988); *Dean v. Nunez*; 503 So.2d 212 (La. App. 4th Cir. 1987), *writ denied*, 506 So.2d 1229 (La. 1988). Further, the action accrues when the plaintiff knows or has reason to know the injury which is the basis of the section 1983

action. *Duplantis v. Bonvillain*, 675 F. Supp. 331 (E.D. La. 1987); *Rubris v. O'Koren*, 621 F.2d 114 (5th Cir. 1980). Thus, it is clear that the constitutional claims of the Jefferson Parish criminal defendants/plaintiffs are prescribed because they knew or should have known of or had sufficient information to mandate an investigation of their injury when they paid or promised to pay their bail bond fees.

The doctrine of *contra non valentum* does not prevent the running of prescription. The Louisiana Supreme Court in *Plaquemines Parish Commission Council v. Delta Development Corporation*, 502 So.2d 1034, 1055 (La. 1987), thoroughly discussed *contra non valentum* [5] and identified the following three fact situations in which the doctrine would apply: (1) where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action; (2) where there was some condition coupled with the contract or connected with the proceedings which prevented the creditor from suing or acting; and (3) where the debtor himself had done some act effectually to prevent the creditor from availing himself of his cause of action.

None of these fact situations applies in the present case. Nothing at any time prevented any of the petitioners from making or ascertaining the claim that the statues in question were unconstitutional. Petitioners made a stilted argument that prescription cannot begin to run until the courts determine that the statutes are unconstitutional. Under that analysis prescription would never begin to run and any and all statutes and actions would always be opened to a challenge of constitutionality. The

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[5] The equitable doctrine of *contra non valentum agere nulla curiet praescription* literally means that prescription does not run against one unable to act. 502 So.2d at 1037 n.5. The doctrine applies when one is effectively prevented from availing oneself of the cause of action by affirmative acts of concealment, misrepresentation and fraudulent conduct. 502 So.2d at 1037-38.

24th JDC Judges at no time did anything whatsoever to prevent the filing of a challenge of constitutionality and indeed could have done nothing to prevent such a filing at any time.

Other prescriptive periods would not apply. The ten year prescriptive period applicable for quasi contractual claims does not apply here. La. Civ. Code art. 3499. No quasi contractual claims are asserted in this matter. The two year prescriptive period provided under La. Rev. Stat. § 15:41 does not apply. La. Rev. Stat. § 15:41 has nothing to do with claims for possession of a fund; rather La. R. Stat. § 15:41 is a statute that provides for the disposition of "property seized" in connection with a criminal proceeding. *General Credit Plan, Inc. v. Pearson,* 341 So.2d 1238, 1241 (La. App. 1st Cir.).

The three year prescriptive period contained in La. Civ. Code art. 3491(1) does not apply. This article governs prescriptions of actions by public officials to recover fees and emoluments from others, not actions against public officials by others to recover fees or emoluments. *Steece v. Louisiana,* 504 So.2d 984, 986 (La. App. 1st Cir. 1987).

IV. LA. REV. STAT. § 47:1401 *ET SEQ.* CREATES NO CAUSE OF ACTION UNDER THE 14TH AMENDMENT DUE PROCESS CLAUSE AND 42 U.S.C. § 1983

Petitioners assert that they state a cause of action under the Due Process Clause and 42 U.S.C. § 1983 because of La. Rev. Stat. § 47:1401 *et seq.* The constitutionality of La. Rev. Stat. § 47:1401 *et seq.* is not an issue and has never been an issue in this lawsuit. At no time until the writ application to the Louisiana Supreme Court did petitioners ever assert that La. Rev. Stat. § 47:1401 *et seq.* is unconstitutional. *Hedges Ward Parrington Properties v. Lee,* 601 So.2d 358, 360 (La. App. 5th Cir. 1992). Thus, any such argument is waived at this stage. Re-

gardless, La. Rev. Stat. § 47:1401, *et seq.* provides that proceedings to recover funds from the State of Louisiana are to be heard by the Board of Tax Appeals. Thus, the petitioners erroneously assert that Louisiana has failed to provide any means to obtain a refund. La. Rev. Stat. § 47:1401, *et seq.* clearly provides for a process in which an individual can make a claim against the State of Louisiana before the Louisiana Board of Tax Appeals to obtain a refund.

V. PETITIONER ATTEMPTS FOR THE FIRST TIME TO RAISE ISSUES REGARDING THE ALLEGED LACK OF IMPARTIALITY OF THE LOUISIANA JUDICIARY

Petitioners have never raised the issue of the perceived impartiality of the Louisiana judiciary in this manner. Indeed the Louisiana judiciary has agreed with the federal court's determination that the statutes in question were indeed unconstitutional. To wait until this late date simply is improper and the Court should not consider claims made by petitioner regarding any alleged impartiality by the judiciary of the State of Louisiana.

CONCLUSION

This Court should deny Petitioners' writ application. The district court, appeals court and Louisiana Supreme Court correctly found that the 24th JDC Judges were protected by the doctrines of judicial immunity and sovereign immunity. The judges only implemented the provisions of the La. Rev. Stat. § 13:994. The 24th JDC Judges did nothing more. In enforcing express laws passed by the Louisiana Legislature, they are entitled to the protection of immunity.

Regardless of assertions to the contrary, Petitioners state no action for deprivation of constitutional rights. Alternatively, a one year prescription period bars Petitioners' claims. The doctrine of *contra non valentum* does not apply. The 24th JDC Judges did nothing whatsoever and could do nothing to prevent the petitioners from maintaining their cause of action. Therefore, this Court should deny this application for writs.

Respectfully submitted,

HENRI WOLBRETTE, III
Counsel of Record
ROGER C. LINDE
JAMES GARNER
MCGLINCHEY STAFFORD LANG
A Law Corporation
643 Magazine Street
New Orleans, LA 70130
(504) 586-1200
Attorneys for Respondents

Supreme Court, U.S.
FILED
NOV 7 1994
OFFICE OF THE CLERK

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In the Supreme Court Of the United States

October Term, 1994

STEVEN AUGUSTUS, ET AL.

Petitioners

VERSUS

STATE OF LOUISIANA, THROUGH ITS GOVERNOR, EDWIN EDWARDS, ET AL.

Respondents

On Petition for Writ of Certiorari to the Supreme Court of the State of Louisiana

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PETITIONERS REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

Jack L. Dveirin
Counsel Of Record

Samuel S. Dalton
Attorney For Petitioners
P.O. Box 10501
Jefferson, La 70181
(504) 835-4289

QUESTIONS PRESENTED

Whether respondents' briefs in opposition to *PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA* contain material misstatements of facts.

Whether the Supremacy Clause precludes a state from using bloated doctrines of sovereign and judicial immunity to refuse to recognize a cause of action for the return of money confiscated in violation of the Fourth, Fifth, and Fourteenth Amendments.

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PETITIONERS REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This reply involves Article VI, §2 of the United States Constitution, which states:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

MISSTATEMENTS OF THE CASE IN THE OPPOSITION BRIEFS

Respondents have filed two briefs in opposition to petitioners' application for a writ of certiorari. One brief, filed by Ms. Bowers on behalf of the State of Louisiana and all three judiciaries involved, will be referred to as the *State Brief*. The other brief, filed by the McGlinchey Law Firm on behalf of the Jefferson Parish Judges, will be referred to as the *McGlinchey Brief*. Both briefs make material misstatements of facts. For example, the State Brief (p.5) characterizes petitioners' first argument as a claim "that the entire Louisiana Judiciary is in some mysterious way unfair and tainted." Petitioners never alleged that there is anything *mysterious* about the state courts' failure to apply state law and the federal constitution to order the return of money unconstitutionally confiscated by the judiciary itself. However, petitioners cannot respond to each and every misstatement within the page limitations of Rule 33. Accordingly, petitioners will reply to seven material misstatements of the case by respondents.

Misstatement Of The Case No. 1: The State Brief claims that petitioners did not raise their federal constitutional issues in the state court proceeding.

Correction To Misstatement No. 1: Every federal constitutional issue raised in petitioners' writ application with this court was raised in their state court proceeding. Petitioners' federal constitutional claims involve the Fourth Amendment, Fifth Amendment, and the Fourteenth Amendment. The Court in Webb's Fab. Pharmacies, Inc. v. Beckwith, 449 U.S.

155,160fn5, 101 S.Ct. 446,449fn5 (1980), held that a Fifth Amendment claim had been raised where, although it was

> not entirely clear that the federal constitutional issue was presented to the Circuit Court . . . . the receiver's memorandum . . . . contains at least one reference to pertinent provisions of the Florida Constitution and its Federal counterpart.

Petitioners' state court petition and amended petition are reproduced in their entirety at Documents Lodged With Clerk By Respondents, Vol. 1, §A and §H respectively. **Petitioners' state court petition and amended petition contain the following language:**

"unconstitutional"	22 references
"unconstitutional seizure"	6 references
"42 USC § 1983"	4 references
"Constitution of the United States"	3 references
"unconstitutionally taken"	1 reference
"constitutional tort"	1 reference
"not a constitutionally valid charge"	1 reference
"due process"	4 references
"14th Amendment"	3 references
"4th, 8th, 14th Amendments"	1 reference
"equal protection clause"	1 reference
"extortion"	1 reference

Petitioners' state court petition and amended petition also contain the following language:

> "That the phrase or *any other claim* contained in LSA-R.S. 47:1481 is unconstitutional, in that said phrase violates the due process clauses of the Federal and State Constitutions in that said phrase is too general, vague and over broad to be understood by men of reasonable intelligence."

Petitioners' state court petition and amended petition also contain the following language:

"The Defendants . . . .have deprived Plaintiffs . . . by failing to provide a meaningful backward-looking relief to rectify the unconstitutional extortion of their monies; all while under the duress of a threat of jail;"

"Said monies and promises of money were coerced from each of the Plaintiffs and those similarly situated, by the Defendants, with the threat of Jail. The Defendants had full and actual power to execute such threat; and,"

"Plaintiffs and those similarly situated had no reasonable means of immediate relief except payment or a promise to pay. In fact and truth it was either pay or promise to pay or remain in jail;"

"That said fees imposed and promises extracted were absolutely void ab initio;"

"The monies and promises herein concerned were solely controlled and used by the defendant Judges, not for the benefit of the Plaintiffs or those similarly situated;"

"The payments made and the promises to pay given by the Plaintiffs, respectively, were done under the most severe compulsion and for the sole purpose of preventing immediate seizure and arrest of their bodies and persons;"

"Said monies and promises of money were actually, in fact and truth, received by the defendants and is, at this time, actually and physically in their control, being unlawfully and unconstitutionally withheld from your Plaintiffs and those similarly situated."

Misstatement Of The Case No. 2: McGlinchey Brief (p.2):

The district court maintained the exceptions of no cause of action, no right of action and prescription.

Correction To Misstatement No. 2: The Louisiana Fifth Circuit Court of Appeal (Appendix to Writ Application, p.A-8):

> Assuming *arguendo* that collection of such a fee is a tort, the trial judge concluded that the tort prescriptive period of one year would run from the commission of the tort--that is, the date the fee was paid--and that the filing of the federal court action had not interrupted the running of the prescriptive period. However, he did not state specifically that the claims herein had prescribed. He ruled instead that the defendant judges have an absolute judicial immunity for such an alleged tort and that the claim against the State for restitution is barred by state sovereign immunity

Petitioners state court petition (as amended) pled causes of action with prescriptive periods ranging from ten years to one year. See: *ASSIGNMENT OF ERROR # 10*, Application By Plaintiffs-Relators For Writs Of Certiorari And Mandamus, Documents Lodged With Clerk By Respondents, Vol. II, §O. Having ruled that no cause of action exists, the state courts could not have ruled that a cause of action prescribed.

Misstatement Of The Case No. 3: State Brief (p.18):

> Thus, as the case was heard by the Fifth Circuit and reviewed on application for certiorari to the Louisiana Supreme Court, there was no statutory authorization for the return of the money so as to provide the basis for a mandamus or mandatory injunction which would defeat judicial immunity.

Correction To Misstatement No. 3: Act 158 of 1989, *Old Jefferson Statute,* (Appendix to Writ Application, p.A-16):

> The fee herein collected shall be refunded to the defendant if he is determined to be not guilty or if the charges are dismissed.

Misstatement Of The Case No. 4: State Brief (p.10):

> No quasi contractual claims are asserted in this matter.

Correction To Misstatement No. 4: State Court Petition, ¶ XIX, Documents Lodged With Clerk By Respondents, Vol. 1,§ A

> Your plaintiffs . . . . are entitled to be reimbursed and the defendants . . . . are, jointly and in solido obligated, with the State of Louisiana, under Louisiana Civil Code Article 2301 to make restitution of the monies paid and vacate the promises made, which were unconstitutionally extorted from said Plaintiffs.

Article 2301 is a quasi contractual cause of action contained in Title V of the Louisiana Civil Code entitled "OF QUASI CONTRACTS, AND OF OFFENSES AND QUASI OFFENSES." This cause of action is discussed at length in Reply Brief On Behalf Of All Plaintiffs/Appellants, Documents Lodged With Clerk By Respondents, Vol. II, §M.

Misstatement Of The Case No. 5: McGlinchey Brief (p.8):

> If plaintiffs have any claims at all, which is denied, they should have submitted these claims to the Louisiana Board of Tax Appeals as asserted by the Appellate Court.

McGlinchey Brief (p.11):

> Thus, the petitioners erroneously assert that Louisiana has failed to provide any means to obtain a refund. La. Rev. Stat. § 47:1401, *et seq.*, clearly provides for a process in which an individual can make a claim against the State of Louisiana before the Louisiana Board of Tax Appeals to obtain a refund.

Correction To Misstatement No. 5: Louisiana Fifth Circuit Court of Appeal (Appendix to Writ Application, p.A-10):

> Plaintiffs have not cited, and we have not discovered, any statute under which the legislature has authorized suits against the state for refund of such a tax.

The state courts held that, because of judicial and sovereign immunity, there is and was no cause of action available to petitioners to obtain a return of their confiscated money.

Misstatement Of The Case No. 6: State Brief (p.6, fn 4):

> A long line of civil cases mandates that the Louisiana Supreme Court not decide **unnecessary** constitutional issues and not take up **redundant** issues.

Correction To Misstatement No. 6: The Louisiana Supreme Court remanded State v. Jones, 586 So.2d 521 (La. 1991) with the exact same federal constitutional issues involving a return of the 2% charge under the Orleans Parish Statute to "decide the constitutional issues raised." The Orleans Judiciary returned Jones' money to moot that matter and the state courts have refused to comment on, let alone decide, the same federal constitutional issues in petitioners' case. When did the federal constitutional issues become ***unnecessary*** and ***redundant***?

Misstatement Of The Case No. 7: State Brief (p.1):

> However, the Court (*sic*, the federal court in Augustus v. Roemer, 771 F.Supp. 1458 (E.D.La. 1991) was silent on plaintiffs' request for return of the 2% fees already collected. A final judgment was entered on July 24, 1991. No motion for **reconsideration** or **clarification** of the "return the money already collected" issue was filed, nor was a motion for new trial ever filed.

Correction To Misstatement No. 7: This statement is half of the truth but misleading as stated. The issue of return of the money was not put at issue before the federal court. The federal judgment stated that "the parties have stipulated that this portion of the case would only involve the facial constitutional challenge." Augustus v. Roemer, supra, 1471fn25. Federal Rules of Civil Procedure 54(b) and 42(b) specifically authorize federal courts to enter judgment on less than all claims presented in a lawsuit. Accordingly, there was no reason for plaintiffs to request a ***reconsideration or clarification of the "return the money already collected" issue.***

The only issue before the federal court was whether to enjoin the four statutes and the plaintiffs prevailed fully and completely on that issue.

I. The Supremacy Clause Precludes A State From Using Sovereign And Judicial Immunity To Deny A Cause Of Action For The Return Of Money Confiscated In Violation Of The Fourth, Fifth, And Fourteenth Amendments.

The specific ground (and the only ground) for dismissal by the state courts was that petitioners' had no cause of action because of judicial and sovereign immunity. There are two points to be made. First, the state courts did not correctly apply the doctrines of judicial and sovereign immunity. Second, even if the state courts had properly applied those two doctrines (which is denied), the Supremacy Clause precludes a state from using immunity doctrines to bar a cause of action mandated by the federal constitution.

The Mcglinchey Brief (p.5) concedes that judicial immunity does not protect judges from injunctive relief in their administrative capacity. "The traditional immunity of judges from liability for damages for acts committed in exercise of their jurisdiction has no applicability to a contest questioning judges' administrative action . . ." Imbornone v. Early, 401 So.2d 953,955 (La. 1981). The judges confiscated and maintain control of petitioners' money. Therefore, judicial immunity does not protect the judges from a mandamus or mandatory injunction to administer the return of the money under their administrative control and custody.

The District Court Judgment held that

> the State of Louisiana under Louisiana Constitution of 1974, Art. 12, Section 10(B) has immunity from suit until such time as the legislature may authorize such an action.

Article 12, Section 10 of the Louisiana Constitution provides,:

> neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property.

Petitioners' pled quasi-contractual and constitutional tort causes of action. The state courts did not mention one word about the quasi-contractual causes of action. Respondents cited tort cases in an attempt to invoke a one-year prescriptive period putting themselves in the untenable position of claiming that petitioners' cause of action is a constitutional tort for prescription purposes, but not a tort for waiver of sovereign immunity purposes.

Alas, state courts cannot be forced to correctly interpret and apply state doctrines of judicial and sovereign immunity. But neither can state courts refuse to recognize a cause of action mandated by the federal constitution by hiding behind bloated doctrines of judicial and sovereign immunity. The power of state courts to disingenuously interpret and apply immunity doctrines breaks down when the Supremacy Clause comes into play. Webb's Fab. Pharmacies, Inc. v. Beckwith, supra, held that a Florida statute which allowed a clerk of court to take possession of interest accruing on an interpleader fund deposited in the registry of a county court was a taking violative of the Fifth and Fourteenth Amendments. Would the court have held that judicial immunity reigned supreme over the Fifth Amendment if the interest had gone into a judges' discretionary fund like petitioners' money?

United States Constitution, Article VI, §2 states:

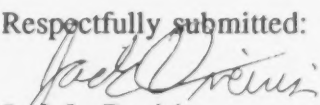
> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

If petitioners arguments are correct that the retention of their money constitutes confiscation in violation of the Fifth Amendment under Webb's Fab. Pharmacies, Inc. v. Beckwith, supra, or wrongfully seized and withheld property in violation of the Fourth Amendment under Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 87 S.Ct. 1642 (1967), or a violation of the due process and equal protection clauses of the Fourteenth Amendment, then those federal constitutional mandates reign *supreme* and *the Judges in every State shall be bound thereby.*

CONCLUSION

Petitioners have stated a cause of action for return of their money. Their petition for certiorari should be granted.

Respectfully submitted:



Jack L. Dveirin
Counsel Of Record

Samuel S. Dalton
P.O. Box 10501
Jefferson, La 70181
(504) 835-4289

Attorneys For Petitioners